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Introduction

On Thursday 30 June 1785, the porter at the Imperial Aulic Council in Vienna, the *Reichshofrat* (hereafter RHR; in English, Imperial Aulic Council, from the Latin, *Consilium Aulicum*), one of the two supreme courts of the Holy Roman Empire, received a thick file of a few hundred pages.[1] This was not unexpected, as legal matters were the business of the court and papers were routinely delivered to its gates. What the porter might have found somewhat curious, though, was that part of the file was written on gilt-edged pages. If his curiosity had gotten the better of him and he had flipped through these leaves, he might have been even more surprised to see that they contained colorful, beautifully handwritten texts in a foreign script. He would have been looking at Hebrew legal texts, many of which were from Rabbi Joseph Caro's sixteenth-century code of Jewish law, *Shulḥan `aruk*, with accompanying German translations and explanations. An ornate title page introduced the next forty-four pages as "Gesetze der Juden betrefend Verbindlichkeiten der Eheweiber in Absicht auf die Schulden ihrer Ehemaenner und Handlungs Contracte oder so genannte Schetaros Isskÿ Rabbinisch und Deutsch" (Laws of the Jews Considering the Liabilities of Wives in Cases of their Husbands' Debts and Business Contracts or the so-called "Issky Contracts" in the Language of the Rabbis and German). (Figure 1) These texts had been carefully chosen by a legal team in Frankfurt and prepared with the help of at least two converts from Judaism to Christianity. They were submitted to the court so that its members could judge a case on appeal between two parties of Frankfurt Jews based in Jewish law (*halakah*).

Research and writing of this study were carried out while the authors were members of the group "Rethinking Early Modern Jewish Legal Culture: New Sources, Methodologies, and Paradigms" at the Israel Institute for Advanced Studies (2018–2019). We thank the Institute for the opportunity to work together and the fellow members of our group for their support and input. Financial support was also provided by the Gerda Henkel Foundation, Leo Baeck Institute (New York), and the Marie Curie Actions, EC FP7, EURIAS Fellowship Program. The authors acknowledge the Honorable Neal Hendel, Vice President (Emeritus) of the Supreme Court of Israel, for his comments.

[1] For an English language discussion of the RHR, see Auer, "The Role of the Imperial Aulic Council," 63–76. The second supreme court, the *Reichskammergericht*, founded in 1495, was situated in Wetzlar, about 50 km north of Frankfurt, from 1689. For differences in the character of the two supreme courts, see Baumann, "The Reichskammergericht," 96–103, and Ortlieb, "The Holy Roman Empire," 94–95.

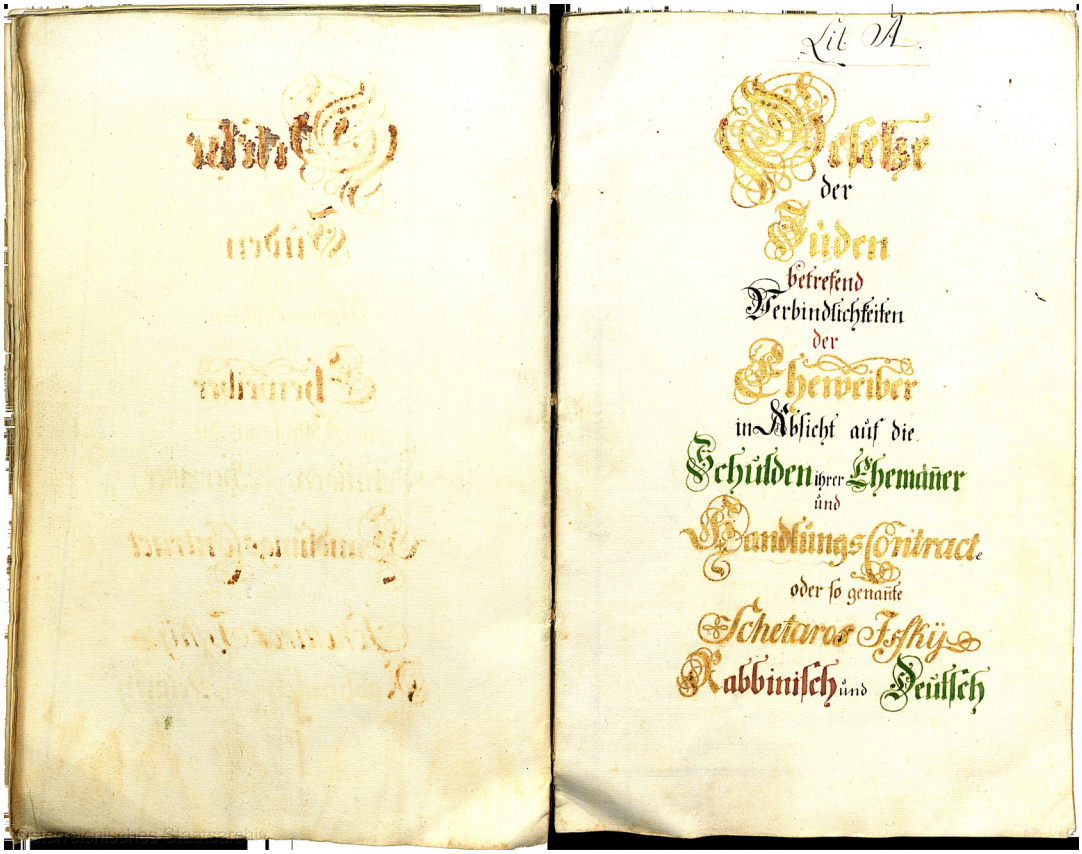

Figure 1: Title page of Annex A. Austrian State Archive. ÖStA, HHStA, RHR Denegata recentiora, K390, Fasc. 34, Lit. A, no folio number.

While the details of the case are unique, the phenomenon was not. By the time this file arrived at the RHR, intra-Jewish litigation in the courts of non-Jews had been commonplace for centuries. Current research has placed this crossover between communities within various frameworks. Scholars who study the legal systems that individuals must navigate call these overlapping jurisdictions "embedded justice" or "legal pluralism."[2] Researchers who focus on

[2] Griffiths, "What Is Legal Pluralism?," 1–55, offers a definition and discusses different types of legal pluralism while providing significant historical background for the concept. Tamanaha, *Legal Pluralism Explained*, 19–36, provides a historical survey of the concept. Ross and Stern, "Reconstructing," 109–41, focus on the ideology of early modern legal pluralism. For a discussion of legal pluralism in the context of the Jewish community in eighteenth-century Metz, see Berkovitz, *Law's Dominion*, 42–44. The Ottoman Empire also embraced legal pluralism through the millet (Barkey, "Aspects of Legal Pluralism," 81–108). See Gready, "Reconceptualising Transititional Justice," 6–10, regarding the difference between "distant justice" and "embedded justice." With respect to the early modern Jewish community in Amsterdam, see Oliel-Grausz, "Dispute Resolution," 250–252.

the agency of the "customers" of the legal system label it as "forum shopping" (in German research, *Justiznutzung*).[3]

Although the case presented here was between two Jewish parties who lived in Frankfurt, it quickly moved beyond the city's borders. In doing so, it tapped into a rich body of European legal literature on the relationship between Jewish and non-Jewish courts, including ecclesiastical courts (e.g., consistorial courts). Following this case through several courts can help us develop an epistemology of the Jewish legal experience in the context of European legal traditions. Analyzing the evolution of European legal thought alongside the socially immured legal practices in early modern Central Europe's Jewish world may help us to uncover the personal, intellectual, and institutional networks that directed the ongoing litigation of a Jewish case in non-Jewish courts.

Personal networks at this time were not restricted to confessional boundaries and displayed a high level of cooperation between Jews and non-Jews. Collaboration demanded the mediation of cultural norms and the crisscrossing of language barriers, and the translations of Jewish legal culture in the written court pleas are in the foreground of our analysis.[4] Converts from Judaism to Christianity were uniquely well-positioned to assist in this effort. Integrating religious identity markers as well as social status and gender into the analysis of early modern legal cases enhances and refines our understanding of early modern legal systems.[5]

Early modern communities and institutions in the Holy Roman Empire were interconnected, even those of different confessions. While previous research has shown that Jews enjoyed a high level of legal autonomy in conflicts pertaining to ritual practice and family matters such as marriage and divorce, this case demonstrates the permeability of Jewish jurisdiction in civil matters, particularly economic disputes. (Early modern European Jews did not have the right to deal with criminal offenses.) The legal sources used by the plaintiffs in this case display an impressive array of legal knowledge, from antique Roman and Jewish law to medieval and early modern Jewish and non-Jewish sources.

While this case must be analyzed within the context of eighteenth-century Frankfurt and the Holy Roman Empire, its ramifications go beyond its time and place. The modern Western nation-state has established more robust and less flexible hierarchies of law than ever before.[6] Yet it has not solved the dilemma of individuals and communities who recognize other sources of law that stand in conflict with state law in particular areas and challenge the sense of civic belonging of those who ascribe to them. The question of whether state justice

[3] Regarding forum shopping and the reasons for it, see Ferrari, *Forum Shopping*, 60–71. For more on this concept in German research, see Dinges, "Justiznutzungen."

[4] See Burke, "Cultures of Translation," particularly 24–34, and Maitland, *What Is Cultural Translation?*, 51–53, regarding the mediation of texts through translation.

[5] On the use of gender as a category of analysis in early modern legal culture concerning Jews, see Kallenberg, *Jüdinnen und Juden*. For a broader introduction, see Gerhard, *Frauen in der Geschichte des Rechts*, and Flossmann and Neuwirth, *Frauenrechtsgeschichte*; Wiesner, *Women and Gender*.

[6] See Sheehan, "The Problem of Sovereignty," 6–9. For a European overview, see Halpérin, "The Age of Codification," and Stolleis, *Public Law*.

systems should recognize the ethnic and religious legal traditions of minorities remains pertinent today.[7] Looking back at more flexible historical models of overlapping legal systems has the potential to inform and enhance current discourses on this topic.

The Right to be Judged by Jewish Law

The notion that Jews living in Christian lands had the right to be judged according to Jewish law even by their fellow Jews was not self-evident. The authority of Jewish courts to decide cases based on Jewish law rather than simply serve as arbitrators of disputes was a question that went back to Roman times. In the fifth century, the Theodosian Code ruled that,

> Jews who live under the Roman and common law shall approach the courts in the customary manner in those cases which concern not so much their superstition (*quae non tam ad superstitionem eorum*) as the forum, the statutes, and the law; and they shall bring and defend all actions according to Roman law; in fine, they shall be subject to Our laws.
>
> 1. Certainly, in the case of civil suits only, if any Jews should suppose that, by a mutual promise to abide by the decision in accordance with the agreement of both parties, they should litigate before Jews or patriarchs as though before arbitrators, they shall not be prohibited by public law from choosing the judgment of such men. The judges of the provinces shall execute their sentences as if such arbitrators had been assigned by the decision of a judge.[8]

The Code implied that Jews had the right to judge matters unique to the Jewish "superstition" according to their own laws, but in civil matters that were covered by Roman law, Jews were expected to go to Roman courts to be judged according to Roman law. If the Jewish

[7] With respect to the United Kingdom, see Malik, *Minority Legal Orders*, 14–20, and specifically concerning Jews there, Cooper, *Governing out of Order*, 136–140. Regarding the rights of Native Americans in the United States, see Tsuk Mitchell, *Architect of Justice*.

[8] Pharr, Davidson, and Pharr, *Theodosian Code*, 2.1.10. The original law was given in February 398 CE. An interpretation found in the Code, but not part of the Code, was composed between 438 and 506 CE (see 1.1.1 n. 7) and sought to clarify matters: "All Jews who are known to be Romans shall conduct before the elders of their religion only those actions that pertain to the discipline of their religion, so that among themselves they shall observe those ordinances established by Hebrew law. But all other cases which are embraced in Our laws and pertain to the forum, they must contest before the judge of the province, in accordance with the law under which all other persons litigate. Of course, if both parties by mutual consent should wish to be heard before the elders of their own law in a civil case only, that which shall be settled by the arbitral judgment following the agreement of a mutual promise to abide by the decision shall be of the same effect as if it had been decided in accordance with the sentence of a judge." Linder, *The Jews in Roman Imperial Legislation*, 204–211, provides a helpful introduction, Latin text with his own translation, comments, and bibliography.

litigants agreed among themselves, they could take their civil disputes for arbitration before Jewish judges, whose power was regarded as contingent upon the Roman legal system. It is "as if such arbitrators had been assigned by the decision of a [Roman] judge." Ultimately, it was the Roman legal system and Roman civil law, not Jewish law, that was binding on the Jews.

These rules seem to have changed about a century later.

The Justinian Code was promulgated in 534 CE and included the same passage found in the Theodosian Code with some small changes and one very significant one.

> Jews living under the general law of Rome shall, in cases pertaining both to their superstition (*quae tam ad superstitionem eorum*) and to questions of venue, laws, and rights, appear in court in the customary manner and shall commence and defend all actions according to the laws of the Romans.
>
> 1. If any of them decides to litigate before Jews, after the fashion of arbiters in civil cases only, they are not forbidden to obtain a decision from them by public law.
>
> 2. Provincial governors shall also carry out their rulings, as if the arbiters had been appointed by decision of a (Roman) judge (i.e., a governor).[9]

The omission of the word *non* in the Justinian Code (*quae tam ad superstitionem eorum* vs. *quae non tam ad superstitionem eorum*) fundamentally changed the meaning of the law. According to the Theodosian Code, Jews had the right to judge matters related to their religion according to their own laws. The Justinian Code demanded that *all* cases between Jews be judged according to Roman law unless the parties mutually agreed to arbitration before Jewish judges.

For centuries, commentators on Roman law debated whether this change in the language of the text was intentional or simply a scribal error.[10] The issue was also raised in the case brought from Frankfurt to Vienna in 1785, as the plaintiff's claims were predicated on the right of Jews to be judged according to Jewish law. The plaintiff's legal team cited early modern commentators such as Guillaume Fournier (d. 1584), a lawyer and teacher who was keenly interested in the restoration of Roman law, his son, Raoul Fornier (d. 1627), who served as a professor of law in Orléans, as well as Jacques Godefroy (d. 1652), a Swiss jurisconsult who wrote a six-volume commentary on the Theodosian Code that was updated and republished twice in the mid-eighteenth century.[11] They all subscribed to the view that the critical omission of the word "non" in the context at hand in the Justinian Code was merely a mistake,

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9 Frier, *The Codex of Justinian*, bk. 1.9.8.

10 The question has troubled scholars to the present day. Kisch, "Zur Frage der Aufhebung," 395–401; Linder, *The Jews in Roman Imperial Legislation*, 206–207; Rabello, "Civil Jewish Jurisdiction," 51–66; among others, claim that the removal of the word "non" was intentional.

11 On Guillaume Fournier, see Ridderikhoff and Ridder-Symoens, *Quatrième livre*, 65–67, and on Raoul Fornier, who sometimes spelled his name as Fournier, pp. 69–71. On Godefroy, whose edition of the Theodosian Code was emendated and reprinted by Johannes Daniel Ritter in Leipzig in 1736–1745 and

and that the Jews had the right to judge themselves in matters related to their rituals.[12] Yet the plaintiff in the case before the RHR was not asking that Jews judge themselves. Jurisdiction was not the question at hand but rather choice of laws. The plaintiff wanted Jews to be judged according to Jewish law by non-Jewish judges, specifically members of the RHR.

From a Jewish perspective, this was a rather odd request. Jewish litigants being judged by non-Jews, even if according to Jewish law, was a clear violation of halakah. The talmudic sages interpreted the biblical verse "These are the laws that you shall set before them" (Ex. 21.1) as a directive that Jews must bring their legal disputes to Jewish courts and not to the courts of non-Jews, and this held true even if the laws in these systems overlapped. The medieval rabbinic commentator Rabbi Solomon ben Isaac (d. 1105), known by the acronym Rashi, made it clear that taking intra-Jewish cases to the courts of non-Jews was prohibited.[13] Rashi's commentary on the Pentateuch was a cornerstone of Jewish education. It was taught to beginners and popularized through Yiddish translation. For many, it was the subject of weekly, if not daily study. It would certainly have been known by those who prepared the material sent to the RHR in Vienna. Yet even if Rashi had been dismissed as a mere biblical commentator and not a source of law, the following ruling, found in Joseph Caro's authoritative code of Jewish law, *Shulḥan `aruk*, was incontestable:

> It is prohibited to be judged before the idolatrous judges and in their courts, even in a case in which they judge according to the laws of Israel. And even if the two [Jewish] litigants agreed to be judged before them, it is prohibited. And anyone who comes to be judged before them is wicked and it is as if he cursed and raised a hand against the Torah of our master Moses of blessed memory.[14]

There was no ambiguity in Caro's ruling and while there were exceptional cases in which the halakah granted Jews the right to turn to the courts of non-Jews, such as instances in which "A took the property of B and would not return it," this was not such a case.[15]

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again in Mantua (1740–1750), see Irving, *Introduction*, 40–45. Regarding the citation in the case before us, see "RHR, Denegata Recentiora, K390-1," bundle 34, pp. 8–9.

12 Whether Jews in the Holy Roman Empire were to be judged according to Roman law was disputed by jurists in the sixteenth century. See the discussion and sources cited in Klein, "Ungleichheiten als Chance?," 354–358. Godefroy's comments on the passage can be found in German translation in Godefroy, *Codex Theodosianus 16,8,1–29*, 40–41. Godefroy did not specifically say that the word "non" was an omission, but this could be inferred from his commentary.

13 Rashi, Ex. 21.1, based on rabbinic sources, such as *Mekilta de-Rabbi Ishmael* and *Midrash Tanḥuma* on this verse, and Babylonian Talmud (B.T.), *Giṭṭin* 88b.

14 Caro, *Shulḥan `aruk*, Ḥoshen mishpaṭ 26.1. See too the commentary of Rabbi Joshua Falk, *Sefer me'irat `eynayim* n. 2, who made it clear that the prohibition applies even if the non-Jewish court judged the Jews on the basis of Jewish law. Shilo, *Dina' de-malkuta' dina'*, 136, pointed to one "marginal" medieval view that viewed an agreement between two Jews to litigate in a non-Jewish court as binding.

15 Regarding instances in which Jewish law permitted going to the courts of non-Jews, see Simonsohn, *A Common Justice*, 190–191, a position that held sway for centuries (see Caro, *Shulḥan `aruk*, Ḥoshen mishpaṭ 26.2). In these cases, permission from the rabbinic court was required before moving on to the

Yet, the legal prohibition notwithstanding, the use of non-Jewish courts by Jews was not exceptional, whether in Frankfurt or in the Jewish world at large, and it had not been for some time. Intra-Jewish lawsuits had been brought to non-Jewish courts in Muslim lands for various reasons from at least the ninth century, if not earlier, and the practice continued for centuries.[16] Yom Tov Assis has shown that despite strong rabbinic and communal opposition, intra-Jewish disputes were taken to the courts of non-Jews in Christian Spain in the thirteenth and fourteenth centuries.[17] In late sixteenth-century Cracow, the Jewish community vigorously opposed taking intra-Jewish litigation before the courts of non-Jews and obligated community members to inform on anyone who did so.[18] However, as time passed, Jews in eastern Europe brought their internal civil litigation before Polish authorities in ever increasing numbers.[19] Some locales may not have had a rabbinic court; in others, local authorities may not have allowed Jews to judge cases that dealt with issues beyond ritual or ceremonial law.[20]

In the medieval German-speaking lands too, Jews went to non-Jewish courts, particularly when one of the parties was intractable and either refused to go to the rabbinic court or would not heed the demands of Jewish law This did not mean that Jewish communities did not try to limit appeals to the non-Jewish judicial system. In the twelfth century, rabbis in northern France and the Rhineland instituted an ordinance that no Jew could unilaterally

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non-Jewish courts which became what Simonsohn termed "instruments of enforcement." Also see Luria, *Yam shel Shelomoh*, 3.6.

16 See Assaf, *Batey ha-din ve-sidrehem*, 17–18; Goitein, *A Mediterranean Society*, 2:395–402; Simonsohn, *A Common Justice*, 174–197; and Cohen and Ben Shimon-Pikali, *Yehudim be-beyt ha-mishpat*, 563–566, regarding cases of civil status and family law in sixteenth-century Ottoman Jerusalem.

17 Assis, "Yehudey Sefarad," 399–430, notes that in royal courts, the king sometimes directed judges to rule on the basis of Jewish law (412–413). Lauer, *Colonial Justice*, 134–135, also found that in matters of family law and personal status, non-Jewish courts in Venice and Crete during the period of Venetian rule used Jewish law – or what they thought was Jewish law – to judge Jews.

18 See Balaban, "Die Krakauer Judengemeinde-Ordnung," 309–310.

19 Rosman, "The Role of Non-Jewish Authorities," 60–63. Also see Hundert, *Jews in Poland-Lithuania*, 107–108. Writing almost immediately after the so-called Khmelnytsky Uprising (1648–1649), Hannover, *Abyss of Despair*, 120, said of Polish Jewry that "never was a dispute among Jews brought before non-Jewish judges or before a nobleman, or before the King, may his glory increase, and if a Jew took his case before non-Jewish judges they would severely chastise him" (we have slightly modified Mesch's translation). As Katz, *Tradition and Crisis*, 83 n. 36, noted, this would appear to be a refugee's idealized image of the grandeur of his lost world.

20 Shochat, *'Im ḥilufey tequfot*, 73, 80, 86. Also see Malkiel, *A Separate Republic*, 37–42. Rabbinic courts were not the only venue for intra-Jewish justice. Lay courts were common in many locales. Writing in eastern Europe in about 1546, Luria, *Responsa*, no. 4, observed that most cases were heard by lay courts. Luria believed that "due to our great sins" rabbinic courts had all but disappeared due to the poor quality of the rabbinic judges. Lay courts based themselves on common sense, business customs, and their sense of justice, not halakah (see Isserles, *Responsa*, no. 33 [p. 192], an important source for the acceptability and limitations of forum shopping in Jewish law). Such courts were not unique to eastern Europe or this period. See the discussion in Elon, *Jewish Law*, 24–33; Bregoli, *Mediterranean Enlightenment*, 59; and Filer, "A Space for Jewish Justice."

bring a fellow Jew to non-Jewish courts.[21] Rabbi Me'ir of Rothenburg (d. 1293), the leading rabbi of his day and a beacon of Ashkenazic halakic thought for centuries, ruled that even when one of the parties was recalcitrant, the appellant had to ask the leaders of the Jewish community for permission to take the dispute to the courts of non-Jews. Later, in the sixteenth century, Rabbi Solomon Luria (d. 1573, Poland-Lithuania) loosened this restriction and allowed litigants to turn to non-Jewish courts if this option had been specified in their original contract.[22]

In early modern Frankfurt too, intra-Jewish litigation often took place in non-Jewish courts. As Sabine Frey, Annette Baumann, Barbara Staudinger, and most recently, Tamar Menashe have shown, Jews had brought their cases before imperial courts since the sixteenth century.[23] In 1603 the leaders of five Jewish communities met in Frankfurt to deal with mutually pressing issues. Their very first ruling aimed to prevent the use of non-Jewish courts by Jews in disputes with fellow Jews. According to the language of the ordinance, it was "common" that Jews forced their co-religionists to appear before non-Jewish courts.[24] While the municipality of Frankfurt accepted such cases, it does not appear to have been pleased with the situation. In 1674–1675 the Frankfurt Jewish leadership reported that the Frankfurt municipality had declared that Jews should handle many of their own cases internally so that they would not overwhelm the Frankfurt courts.[25] Despite the demand, as the seventeenth century progressed, individual Frankfurt Jews – and the Frankfurt Jewish community itself – continued to litigate intra-Jewish disputes before both the Frankfurt municipal court and the imperial courts, and continued to do so into the eighteenth century.[26] Such appeals to non-Jewish courts could force the community's hand. For example, in the 1770s, a Jewish woman named Hanle Fulda was denied resident rights in Frankfurt by the Jewish community. She appealed the decision to the Frankfurt courts in a case that ultimately wound its way to the RHR, where her appeal was granted. In a case marked by considerable irony, Hanle went outside the Jewish community to get into it and did so successfully.[27]

Intra-Jewish litigation before non-Jewish courts took place in other locales in the Holy Roman Empire as well. The rabbinic court in Hamburg was suspended from 1753 to 1763 by royal order and Jews there became accustomed to turning to the local non-Jewish judicial

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21 Finkelstein, *Jewish Self-Government*, 153, with an English translation on 155–156, and n. 1, in which Finkelstein suggests that Jews could go to the courts of non-Jews if both parties acquiesced to this.

22 See the discussion in Luria, *Yam shel Shelomoh*, 8.65, who cited the views of Rabbi Me'ir of Rothenburg.

23 Frey, *Rechtsschutz der Juden*; Staudinger, "In puncto Debiti," 153–180; Baumann, "Jüdische Reichskammergerichtsprozesse," and Menashe, "The Imperial Supreme Court and Jews." Regarding Jews litigating cases against the nobility at the RHR, see Griemert, *Jüdische Klagen*.

24 Zimmer, *Jewish Synods*, 148–154, 184–186, with an English translation on 192, 197, and Horovitz, *Frankfurter Rabbinerversammlung*, 20–21, for a minor textual correction. The five communities were Frankfurt, Worms, Fulda, Friedberg, and Günzburg.

25 See Kaplan, *The Patrons and Their Poor*, 60, and Litt, *Jüdische Gemeindestatuten*, 80–81, no. 97.

26 See Kasper-Holtkotte, *Die jüdische Gemeinde von Frankfurt*, 95–106; Gotzmann, *Jüdische Autonomie*, 71–90, who outlines the decline in Jewish judicial autonomy, and Kasper-Marienberg, *Vor Euer Kayserlichen Mayestät Justiz-Thron*, 50–52.

27 See Kasper-Marienberg, "Jewish Women at the Viennese Imperial Court," 176–192.

system. By the late eighteenth century, Jews regularly litigated between themselves in the local municipal courts.[28] Even in communities in the Empire that boasted a well-established Jewish court system, such as Prague, it seems to have been customary for Jews to take disputes regarding bills of exchange directly to non-Jewish courts. Rabbi Samuel Landau was the religiously conservative son of one of the leading rabbis of the eighteenth century, Ezekiel Landau.[29] Ultimately, he became the head of the rabbinic court in Prague just as his father had been. Sometime before 1776, Samuel wrote that it was "the universal custom" of Jews to take cases involving bills of exchange directly to the non-Jewish courts without even attempting to settle matters in rabbinic courts. Landau said that this had become so accepted that people thought that it was permitted.[30]

There was rabbinic opposition to this custom – for example, from the famed Rabbi Jonathan Eybeschütz (d. 1764), who was a rabbinic judge in Prague before moving to Metz in 1741. In Metz, an ordinance of the Jewish community from 1720 appears to have specifically allowed Jews to take cases involving payable to the bearer notes to the courts of non-Jews. Eybeschütz, writing while in Metz, believed that this practice violated the biblical prohibition of Jews taking their cases before the courts of non-Jews, yet he knew that there was little that he could do about it.[31] A Metz ordinance from 1769 was even more permissive and in 1781 the Jewish community there made it clear that a Jew "who brings a suit against his fellow Jew" in a matter related to bills of exchange could go directly to the non-Jewish courts.[32] As for the prohibition of going to the courts of non-Jews, the rabbinic court in Metz said that the prohibition of litigating in non-Jewish courts did not apply regarding bills of exchange, perhaps because they were perceived as simply a procedural matter.[33]

Reasons for going to the courts of non-Jews varied and could include ease of access, their ability to enforce decisions, perceived legal advantages, and, perhaps as in the case of letters of credit, a sense that the non-Jewish legal system reflected the current practices of the market-

28 See Horowitz, "Fractures and Fissures," 131–136, 211–212.

29 On Samuel Landau, see Flatto, "19th-Century Prague," 298–314.

30 See Landau's question to his father in Landau, *Responsa*, Ḥoshen mishpaṭ no. 10. Note that in sixteenth and seventeenth-century France, bills of exchange were taken to special merchant tribunals and not to the regular civil courts. See Trivellato, *The Promise and Peril of Credit*, 86–87. Eighteenth-century courts in the Holy Roman Empire were instructed to consult merchants to learn about accepted customs regarding bills of exchange. The letter of the law was considered insufficient. See Amend-Traut, "The Files and Exhibits," 198–199.

31 See Berkovitz, *Law's Dominion*, 129–131. Berkovitz suggests that those who permitted the collection of bills of exchange in non-Jewish courts may have viewed the contractual agreement as undisputable proof of what was owed, "so that that the case could no longer be considered adversarial" (131). Eybeschütz's discussion appears in his *Urim ve-tumim*, 26.1 n. 1.

32 The 1769 ordinance is transcribed in Litt, *Jüdische Gemeindestatuten*, pp. 377–378, no. 68. Regarding 1781, see Berkovitz, *Law's Dominion*, 152–153.

33 Berkovitz, *Protocols of Justice*, 130–132.

place better than Jewish law did.[34] Discontent with the rulings of rabbinic courts, a perception that one could not get a fair trial at such courts, or even a desire to challenge communal jurisdiction could also send Jews to the courts of non-Jews.[35] Rabbinic courts, including the Frankfurt rabbinic court, tended to seek compromise rather than invoke the letter of the law.[36] For some, this may have been a preferred route as it was generally a much faster way to settlement; for others, particularly those convinced of the rightness of their own positions, compromise was less desirable.[37]

German law not only recognized the right of Jews to judge themselves, but their right to do so according to their own laws.[38] In the seventeenth century, the Holy Roman Emperor Ferdinand II (r. 1619–1637) strengthened the right of the Jewish community in Prague to judge cases between its members.[39] In Hamburg, the *Judenreglement* of September 1710 stated that the Jews were bound by the laws of the Holy Roman Empire and local police ordinances but had the right to follow the Mosaic law in matters of matrimony, last wills and testaments, and inheritance, so long as these did not contravene local laws.[40] In Worms, Jews had had the right to judge themselves for centuries and in Frankfurt, too, general law guaranteed the Jews the right to judge civil matters among themselves.[41] Cases could be appealed to the non-Jewish authorities, but the court of first instance was the rabbinic court.[42]

Jay Berkovitz and Jordan Katz have both shown that in the late seventeenth and early eighteenth centuries, the Jewish community in Metz emphasized the need for a strong

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[34] On reasons for going to non-Jewish courts in various environments, see Simonsohn, *A Common Justice*, 175–182; Goldberg, *Trade and Institutions*, 161–164; Ben-Sasson, *Ẓemiḥat ha-qehillah*, 312–316; Shochat, *'Im ḥilufey tequfot*, 73–74; and Shashar, *Gebarim ne`elamim*, 109–116, 239.

[35] Katz, "To Judge and Be Judged," 443, 451–452. On perceptions of bias at the court of Rabbi Jonathan Eybeschütz in Hamburg, see Horowitz, "Fractures and Fissures," 127–128.

[36] See the numerous examples in Fram, *A Window on Their World*, nos. 38, 39, 42, 43, 45, 48, and particularly no. 112, among others. Compromise or mediation was also used extensively in medieval Egyptian Jewish communities. See Ackerman-Lieberman, *The Business of Identity*, 172–188.

[37] Some compromises took months to achieve. See Fram, *A Window on Their World*, no. 62.

[38] See Wehner, *Practicarum juris*, 233. Wehner's book was first published in 1608 and was reprinted five times in the seventeenth century and twice more in the eighteenth century. Wehner's reputation remained strong, and a biography, Ernst, *Leben des berühmten ICti Pauli Matthiae Wehneri*, was published in 1735, the same year that a new printing of *Practicarum juris* appeared in Strasbourg.

[39] Lipscher, "Zwischen Kaiser, Fiskus, Adel, Zuenften," 120.

[40] Fischer, *Commentatio*, 83–84.

[41] Fischer, 74–76.

[42] Meeting in Kremsier (today Kroměříž in the Czech Republic) in early 1694, the communal leadership of Moravian Jewry prohibited Jews from taking their disputes to the civil authorities but allowed appeals of rabbinic decisions to non-Jewish governmental agencies (Halperin, *Taqqanot medinot me`hareyn*, no. 467). The exact dating of the ordinance is somewhat problematic; see p. 157 n. 1. As Halperin noted, the idea of appealing rabbinic decisions in non-Jewish courts was not universally accepted. In an ordinance of 1680, the Jewish community in the Moravian town of Gaya (today Kyjov in the Czech Republic) did not allow this. See Flesch, "Tekkanoth Gaya," 31, 33 no. 22. In Fürth Jews had judicial autonomy without the right to appeal to the authorities. See Fischer, *Commentatio*, 81. This was noted by Dohm, *Concerning the Amelioration*, 70 n. 32, who did not think that this was an advantageous arrangement for Jews.

autonomous Jewish judiciary and took a strong stand against individuals who took their cases to the non-Jewish courts.[43] As Berkovitz wrote, "precisely because the boundaries between the two legal systems were not as rigidly demarcated as is commonly assumed, communal leaders found it necessary to define when recourse to the civil courts was justified and when it was not."[44] An authorization from the rabbinic court was required before bringing a case between two Jews to the civil courts.[45] The non-Jewish authorities in Metz also assumed that cases between Jews were to be judged according to Jewish law. However, in the seventeenth century, there were efforts to limit Jewish legal authority to matters connected to religion and civil disputes and force Jews to turn to non-Jewish courts in other matters.[46]

In 1734, as part of its struggles with the French monarchy for a greater level of power, the Metz *Parlement* limited the civil jurisdiction of the Jewish community, forcing it to cede some of its judicial authority.[47] In 1742, the French monarch and the *Parlement* of Metz ordered local Jews to prepare a compendium of Jewish law to help French judges adjudicate cases between Jews. The *Recueil des lois, coûtumes et usages observes par les juifs de Metz* was completed in 1743.[48] Historians have described the rationale for the collection in several different ways. Jay Berkovitz has interpreted this move as a sign that the *parlement* of Metz accepted the judicial autonomy of the Jewish community, while Jordan Katz has argued that this was intended to limit the juridical authority of the Jews.[49] Shael Herman has gone further and seen it as a tool for the French authorities to undermine the rulings of the rabbinic court.[50] However one chooses to understand the writing of the *Recueil*, it is clear that the rabbinic court in Metz was integrated with the French legal system and Jews routinely took cases to the French courts, even before the Revolution.[51]

Similarly, in 1770 the Jewish community of Berlin was asked to produce a German-language handbook of Jewish ritual law. The absolutist Prussian state wanted to restrict the authority of Jewish courts but recognized the rights of Jews to be judged according to their own laws. Government courts needed to be informed about Jewish law so that they, and not

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43 Glueckel of Hameln, *Glikl*, 299, wrote, "it was unheard of to litigate in the non-Jewish courts of law outside the Jewish quarter. If disputes arose, as happens unfortunately among Jews, it would all be resolved quietly by community institutions or rabbinical judges." Again, this may be an overly rosy view of the situation in Metz. See Shochat, *'Im ḥilufey tequfot*, 72; Berkovitz, *Law's Dominion*, 86; and Katz, "To Judge and Be Judged," 444.

44 Berkovitz, *Law's Dominion*, 221.

45 See the examples cited by Berkovitz, 221–222. Also see Herman, "Tout Fait Maison," 2; Assaf, *Batey ha-din ve-sidrehem*, 23–24.

46 Katz, "To Judge and Be Judged," 443.

47 See Berkovitz, *Protocols of Justice*, 48–50; Katz, "To Judge and Be Judged," 443. Regarding the background for the changes in French policy towards Jewish judicial autonomy, see Katz, especially, 439–442, 449–450.

48 On the *Recueil des lois, coûtumes et usages observes par les juifs de Metz* and its use, see Berkovitz, *Law's Dominion*, 150, 200–202, 282–284, and Herman, "Tout Fait Maison," 1–56.

49 Berkovitz, *Law's Dominion*, 200–201; Katz, "To Judge and Be Judged," 439.

50 Herman, "Tout Fait Maison," 12.

51 See Berkovitz, *Protocols of Justice*, 108–109, 115–122; Berkovitz, *Law's Dominion*, 4, 7.

the rabbinic courts, could judge Jews. After significant delays, Rabbi Herschel Levin and Moses Mendelssohn produced *Ritualgesetze der Juden betreffend Erbschaften, Vormundschaftssachen, Testamente und Ehesachen* (Ritual Laws of the Jews Regarding Inheritance, Matters of Guardianship, Wills, and Matrimonial Matters), published in 1778.[52] Similarly, in England non-Jewish judges interpreted, imposed, and enforced Jewish law between Jewish litigants. In the 1790s, English state judges consulted rabbis and Jewish legal codes in considering the validity of marriages between Jews. The civil authorities assumed that marriages between Jews had to comply with the requirements of Jewish law.[53]

In 1754, Empress Maria Theresia centralized state powers in the Habsburg hereditary lands through the "General Police Process and Commercial Ordinances." The laws incorporated ordinances of the Jewish council of Moravia into state law, effectively giving government backing to the rules of the Jewish community.[54] It was clear to her that Jews were subject to the laws of the nation, but those laws recognized that in many areas of civil life, Jews were to be judged according to their own rules. Joseph II considered abolishing Jewish communal autonomy in Galicia in 1784, yet he too assumed that Jews had the right to be judged according to their own laws. The plan was to judge Jews in Galician state courts according to Jewish law based on the handbook written by Levin and Mendelssohn. While the idea was ultimately abandoned, it demonstrates that in the last decades of the eighteenth century it was still assumed in the Holy Roman Empire that intra-Jewish disputes could be judged according to Jewish law, even in state courts.[55]

Kann *v.* Bamberger

The files that were delivered to the Imperial Aulic Council in June 1785 concerned a loan agreement that was contracted in Frankfurt on 14 January 1777 between local Jews. Lemele Bamberger (sometimes noted as Bamberg, d. 1794) and his wife, Fradche (d. 1806), borrowed money from Leb Kann, son of the late leader of the Frankfurt Jewish community Ber Löw Kann (d. 1754), and himself an administrator of charitable funds in the community. In the presence of witnesses, the Bambergers obligated themselves and their heirs to Leb Kann for

52 See the discussion in Sorkin, *Moses Mendelssohn*, 104–106. For a fuller discussion of the origins of the work, see Mendelssohn, *Schriften zum Judentum*, 7:cvi–cxxviii, and Bourel, *Moses Mendelssohn*, 447–450.

53 Henriques, "Jewish Marriages," 435–441; Filer, "A Space for Jewish Justice," 84–86.

54 See Wolf, *Die alten Statuten*, iv; Müller, *Urkundliche Beiträge*, 81–102. Also see Löw, "Abraham und Josef Flesch," 411–412; Miller, "Absolutismus und Kontrolle," 94.

55 See Manekin, "The Law of Moses," 238–240. Regarding the use of Levine's and Mendelssohn's legal handbook in the courts of the Electorate of Cologne, see Berendonk, *Diskursive Gerichtslandschaft*, 91–96. Berendonk notes that before the publication of this book the courts relied on Beck's *de juribus Judeorum*, asked specific questions of rabbis to learn about Jewish law, and referred to Michaelis, *Mosaisches Recht*. However, Michaelis's work dealt with biblical, not talmudic, law.

3,278 gulden and 22 kreutzer, a significant sum in 1777.[56] The agreement contained several conditions and contingencies, and included multiple loans that Kann extended to the couple. The Bambergers took one loan from Kann in the amount of 2,178 gulden, 22 kreutzer secured by three bills of exchange payable about two months later in Vienna. The contract stipulated that if the three bills of exchange were paid to Kann, he would lend the Bambergers an additional 1,100 gulden. Beyond this, Kann gave the Bambergers a 1,100 gulden loan secured by real property and movable assets. The agreement laid out a repayment schedule with some installment dates set according to the dates of local fairs. The entire sum was to be repaid within about 18 months.

Kann had ample reason to believe that the Bambergers would fulfill their obligations. Beyond the bills of exchange that secured the first loan and Kann's encumbrance on the Bambergers' assets, the Bambergers had a credit history within the Jewish community. On 8 September 1771, the Bambergers took a short-term loan for 2,600 gulden from two other Frankfurt Jews, Elias Jacob Ullmann (d. 1793) and his brother-in-law, Zalman Goldschmied-Hameln (d. 1812).[57] The Bambergers repaid this loan in due course, as testified to by the record book of the Jewish community, which noted that the loan contract had been ripped up by the rabbinic court. Presumably the obligations recorded in the contract had been fulfilled and the contract was not only no longer needed, it had to be destroyed so that it could not be used by the creditors to collect the debt a second time.[58] Moreover, Kann's first cousin, Frummet, was a Frankfurt native who lived in Fürth and was married to someone who served as a tax collector for the Jewish community there.[59] She or her husband may well have been able to give Leb Kann some information about Lemele Bamberger, who was originally from Fürth and still had family living there.

Kann was not an altruistic creditor. He expected a return on his investment, but the Bible explicitly prohibited the taking of interest between Jews (see Deut. 23.20–21), a rule that was still fully in force in the eighteenth century. Despite the biblical prohibition, by the early seventeenth century, rabbis, like Christian legists, had developed a work-around for intra-Jewish interest-taking.[60] The so-called *heter ʿisqa'* (Heb., lit., "a business allowance") transformed

[56] When Rabbi Pinhas Horowitz arrived in Frankfurt, his salary was 10 gulden per week. He found this insufficient to meet his family's needs and, in June 1772, the community agreed to double his compensation for a period of two years. See Segall, "Ḥomer le-pinkas ha-kahal," no. 434 (1772).

[57] On the familial relationship between Ullmann and Hameln, see Ettlinger, "Ēlē tōldōt," 6.VI.1771. The loan was contracted on the eve of Rosh Hashanah. That Fradche was engaged in a business deal and not at home preparing for the holiday suggests that this was a family of means that had household help.

[58] See Schwarzschild, "Pinqas ha-ne'emanut," fol. 48a. On the nature of this record book, see below.

[59] Frummet was the daughter of Rabbi Moses Kann, Leb Kann's father's brother (see Ettlinger, "Ēlē tōldōt," 29.IX.1719 with 17.XII.1754 and 11.XII.1761). Frummet was still alive at the time of the transaction. She died in the fall of 1788 (see "Fürth Memorbuch," fol. 39r).

[60] The development of legally acceptable intra-Jewish credit took centuries to achieve. For a general discussion of the topic, see Gamoran, *Jewish Law in Transition*. On the *heter ʿisqa'* in particular, see Halperin, *Pinqas vaʿad arbaʿ araẓot*, 18–24, nos. 57–75. In the Christian world, legal issues concerning the prohibition of intra-Christian credit were more or less resolved by the end of the sixteenth century. There were some isolated voices of opposition in the eighteenth century but they had no lasting effect on practice.

the seemingly usurious loan into a partnership that gave the borrower the option of either sharing half the profits – and losses – with the lender or compensating the lender with a set amount. In return for a fixed rate of return, the lender relinquished all claims on the profits. In the Bamberger–Kann agreement, the fixed rate of return was set at what was then a common interest rate, 5% per annum.

The written agreement between the parties was executed in Hebrew, ostensibly according to Jewish law. Two witnesses from the Jewish community attested to the Bambergers' acceptance of the conditions through a *kinyan sudar* (Heb., lit., "a purchase with a scarf"), an action in which Lemele and Fradche each took hold of a piece of cloth for a few moments from the witnesses as an unmistakable sign of acquiescence to the terms of the agreement. This created a legally binding obligation (*vinculum iuris*). An analogous form of acceptance was known in contemporary German society, the *Mantelgriff*, which was still used in the eighteenth century during acts of enfeoffment.[61] To further secure Kann's claims on their assets, the contract specified that the Bambergers fully collateralized their movable and immovable (now often termed personal) property according to the rules of Jewish law. To do so, they unconditionally gave Kann four ells of their landed property. They then figuratively attached their movable property to these four ells and thus encumbered all their assets, what they had at the time and what they would purchase in the future, wherever it might be, to Kann.[62] All this was pursuant to the *kinyan sudar* and the signed written contract.

After the agreement was completed, Fradche and Lemele Bamberger each signed a document that confirmed that the loan agreement had been carried out according to "the ordinances of the Rabbis." The document was then signed by witnesses. A separate but abridged copy of the agreement was prepared and entered into the record book of the Jewish com-

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See Noonan, *Scholastic Analysis of Usury*, 202–229. For a different understanding of the process, see Todeschini, *Franciscan Wealth*, especially 134–196. Also see the suggestive comments of Mell, *The Myth of the Medieval Jewish Moneylender*, 2:5–8.

61 Munzel-Everling, "Mantelgriff." For its use at the royal court in the eighteenth century, see Klueting, *Das Reich und Österreich*, 33–34. Pufendorf, *Friderici Esaiae a Pufendorf*, 207, specifically equated the *kinyan sudar* with the *Mantelgriff*.

62 See Jacob ben Asher, *Arba`ah ṭurim*, Ḥoshen mishpaṭ 113, the accompanying notes in Joseph Caro's *Beyt Yosef*, and Caro's directives in his *Shulḥan `aruk*, Ḥoshen mishpaṭ 113.1–3. The giving of four ells was a legal device that allowed the creditor to encumber the debtor's personal property. It was also used by the Jewish community in contemporary Metz to increase the creditor's ability to collect from the debtor's assets by allowing a lien on personal property that might be sold after the time of the loan but before the debt became due. See Berkovitz, *Protocols of Justice*, 383. The issue was a difficult one and bedeviled credit markets for centuries, as there was a need to balance the interests of creditors with those of third parties who purchased goods from the debtor in good faith. The problem was only really addressed in English law in the nineteenth century through floating charges, in American law in the mid-twentieth century through Article 9 of the Universal Commercial Code, and, in Canada, in the second half of the twentieth century through the various provincial versions of the Personal Property Security Act. Our thanks to Mr. Richard Orzy, an experienced attorney who worked in this field, for his explanations of current laws on the topic.

munity's scribe and one of its several notaries, Rabbi Israel Schwarzschild (d. 1794).[63] At the time, it was customary for a *ne'eman* (Heb., pl. *ne'emanim*), or *Judenbeglaubte* (notary) to be appointed by the community to fulfil various administrative tasks.[64] As early as 1674–1675, communal ordinances of the Jewish community of Frankfurt ordered that the recognized communal notaries must confirm contractual agreements, both business and marital, to the communal scribe so that he could record them in his record book.[65] Over a century after the original ordinance mandating such record keeping, Schwarzschild, acting in his capacity as communal scribe, duly noted in his *pinqas*, the record book he maintained by communal order, that the Bambergers had agreed to the terms of this contract and that it was then notarized by two communal notaries. After this, the loan agreement was given to Kann so that he could use it to collect from the Bambergers in due course.[66]

There was nothing particularly unusual about the loan process or the agreement. Frankfurt Jews commonly lent money to each other using the *heter ʿisqa'* and had the transaction notarized and transcribed in the scribe's record book. The repayment schedule also reflected widely accepted practice, as payments were generally made in installments in the Jewish community of contemporary Frankfurt. The amount of the loan was significant, yet for the parties involved these were not particularly large sums. Leb Kann was a wealthy and influential man who knew how to deal with the authorities. According to a memorial record, Kann succeeded in saving "the souls" of three Jews, one whose death order had already been signed and two others who had been sentenced to serve on gallies.[67] Kann lived in a house facing the synagogue on the *Judengasse* (lit., "the Jewish lane"), presumably a choice location. In addition, Kann had a country house in the village of Griesheim, about 30 km away. When Kann died in 1785, an inventory of his assets included extensive household items plus silver, diamond rings, rubies, emeralds, pearls, and in two storage basements outside of the Judengasse, 33 barrels of wine from different regions of the Rhine and, in a different storage area, wool and cotton. Kann also had 35 sheep and 7 lambs which, like some other Frankfurters, he kept on the other side of the Main River under the care of members of the Teutonic Order.[68]

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[63] Schwarzschild was appointed the community's scribe and a notary in 1741. See "Frankfurt *Memorbuch*," fol. 340v, p. 679. Unlike in some contemporary jurisdictions such as Israel, a notary did not have to be a lawyer.

[64] We thank Professor Elisheva Carlebach for the translation of the term. The term "*ne'eman*" did not always have this meaning. See, for example, Halperin, *Pinqas va'ad arba' arazot*, no. 112, from 1624. Notaries were called by different names in different places. For example, in Cracow in 1595 a notary was called an "*ʿed de-mata*'," literally "a witness of the town" (see Balaban, "Die Krakauer Judengemeinde-Ordnung," 339).

[65] See Litt, *Jüdische Gemeindestatuten*, 69 (no. 54), and in German translation, 485 (also no. 54).

[66] Schwarzschild, "Pinqas ha-ne'emanut," fol. 160r. The two notaries in this case were Me'ir Levi and Wolf Burich both of whose names were noted in the margin of the record. There is also a note that the contract was given (*masur*), presumably to the creditor.

[67] "Frankfurt *Memorbuch*," fol. 297v, p. 593. On the meaning of the term *ga'leʿ*, see Reischer, *Responsa*, no. 133.

[68] Dietz, *Frankfurter Handelsgeschichte*, 4 pt. 2:709–710.

Kann led the banking house that his father, Ber Löw, and uncle, Moses Kann, had managed. The earlier generation had extensive credit dealings with the local nobility that Leb continued.[69] Among his clients were Karl von Dalberg of Mainz (9,000 florins) and Prince Ludwig Georg Karl of Hessen-Darmstadt (6,000 florins).[70] Kann was also a partner in a business in The Hague with members of the well-to-do Boas family and his son, Isaac, married – or perhaps more accurately, was married off to – the daughter of Tuvye Boas.[71] Upon his death, Kann's net worth was set at 136,500 gulden.[72]

As for the Bambergers, as mentioned, Lemele Bamberger hailed from Fürth. He arrived in Frankfurt in 1750 where he had two firms, one provisioning bread for local army recruits and a second dealing in textiles.[73] Bamberger was heavily involved in the credit market, circulating an average of 60,000 reichsthalers in loans annually between 1762 and 1767.[74] The more than three thousand gulden loan from Kann was a significant sum, but it was well within the range of Kann's and the Bambergers' normal business practices.

Bamberger was no stranger to the RHR. Around 1762, he married Fradche, daughter of Samuel Schuster, a resident of Frankfurt who possessed *Stättigkeit,* the legal right to live in the Jewish community. The marriage was a key step for Bamberger in acquiring resident rights of his own in the Frankfurt Jewish community, which only accepted six foreigners a year into its ranks and required new residents to marry a local partner.[75] This was very similar to the rest of Frankfurt, where marriage into a family with citizenship was the surest way for members of religious minorities such as Calvinists to attain burghership. In the first half of the eighteenth century, Lutherans in Frankfurt challenged this path to citizenship, but the concept endured, albeit with various conditions.[76]

During his year-long engagement with Fradche, Bamberger's employer was investigated by a commission of the RHR for currency crimes (*Münzverbrechen*) and, apparently as part of the investigation, Bamberger himself was imprisoned.[77] Fradche visited Lemele in jail and soon after it became obvious to all that she was pregnant out of wedlock. According to Lemele, in the jail cell, "they indulged too much in their true love before the time" (*ihrer an*

[69] See Dietz, 4 pt. 2:705–707.

[70] Dietz, 4 pt. 2:709. A gulden and a florin were synonymous in contemporary Frankfurt. There were 60 kreutzer in a gulden/florin and 90 kreutzer in a reichsthaler.

[71] On the Boas family, see Litt, *Pinkas, Kahal, and the Mediene*, 54–55 with n. 89. Regarding the marriage, see Ettlinger, "Ēlē tōldōt," 6.IX.1811.

[72] Dietz, *Stammbuch*, 164.

[73] Dietz, 21, dated Bamberger's arrival in Frankfurt to 1762. However, when testifying in a different case in 1766, Bamberger specifically said that he had arrived in Frankfurt sixteen years earlier, i.e., in 1750. See "RHR, Decisa, K2135," bundle 7 (no pagination).

[74] See Dietz, *Stammbuch*, 20–21.

[75] *Der Juden zue Franckfurth Stättigkheit undt Ordnung, wie die im Nahmen der Kayßerlichen Maytt. geendert unnd verbeßert worden, de anno 1616*, secs. 105–108. On attaining resident rights in contemporary Jewish communities in the region, see Kaplan, *The Patrons and Their Poor*, 71–73.

[76] See Soliday, *A Community in Conflict*, 198–230.

[77] The commission's work and the accompanying court proceedings are documented in a printed and annotated collection of the RHR files, *Abdruck . . . 5. Octobris 1758*.

sich gerechten Liebe vor der Zeit zuviel indulgirten).[78] We do not know how Fradche perceived of her pregnancy or if she considered the intercourse in prison as voluntary. Fradche may well have offered a different description of the event given the chance, but her gender and her honor may have sealed her lips. Once pregnant, Fradche would probably no longer have been able to claim that she was raped, if that was the case.[79] We can assume that marriage to the father of her child was her only option to retain or regain her honor which, for women, was a direct function of one's chastity in both Christian and Jewish early modern societies.

With Fradche pregnant, the sexual encounter soon became known both to the leaders of the Frankfurt municipality and the Jewish community.[80] After his release from prison, the Frankfurt consistory (*Konsistorium*), which had jurisdiction over the extra-marital sexuality of Jews as well as Christians, punished Bamberger for the sexual act with a monetary fine.[81] Such a fine was in keeping with punishments meted out by the contemporary *Konsistorium* for similar misdemeanors committed by non-Jews. Lemele's punishment was lighter than those that had been assessed in general in earlier times for similar crimes. In the 1770s, the Frankfurt authorities explicitly expressed their concerns that severe punishments could lead unmarried women to seek an abortion or kill the infant, as had happened in several cases in Frankfurt between 1744 and 1772.[82] If the couple married, the non-Jewish authorities were content simply to fine the couple for their indiscretion.[83]

As for the Jewish community, this was an opportunity to rid itself of both a foreigner and a moral offender.[84] Banishment was one of the most common criminal punishments of the early modern period and Frankfurt authorities imposed it on foreigners more often than on its own citizens.[85] In 1662 the Jewish community had banished for three years a widow who became pregnant, and forbade her from ever having resident rights in the community.[86] Perhaps the widow's case was deemed particularly severe because she did not enter into a marital

78 "RHR, Decisa, K2135," bundle 7.

79 See "RHR, Decisa, K2135," bundle 7, attachment 2 from 25 October 1764. On the almost impossible obstacles that women had to overcome to bring any form of rape charge to court, see Wiesner-Hanks, *Christianity and Sexuality*, 79–81.

80 The case, both in the context of the Jewish community and the municipality, drew the interest of contemporary legal commentators and was discussed in detail in Orth, *Samlung merkwürdiger Rechtshändel*, 8:648–655. Note that in another case of premarital sexual relations that resulted in pregnancy (see below), the by-then husband and father of the child, Isaac Bing, asked the *Konsistorium* to transfer all authority to punish him to the Jewish community, which it did. See Segall, "Ḥomer le-pinkas ha-kahal," no. 498 (1788).

81 From 1726/1728 on, the Frankfurt *Konsistorium* was responsible for oversight of marriage and the regulation of sexuality. On this and the *Konsistorium*'s authority over Jews, see Kamp, *Crime, Gender*, 169, 189.

82 See Kasper-Marienberg, "Jewish Women at the Viennese Imperial Court," 187.

83 See Kamp, *Crime, Gender*, 255–271, and Hull, *Sexuality, State, and Civil Society*, 69, 74.

84 See Coy, *Strangers and Misfits*, 30.

85 Kamp, *Crime, Gender*, 255.

86 Segall, "Ḥomer le-pinkas ha-kahal," no. 292 (1662).

relationship with the father of the child.[87] Nevertheless, in 1675 the community ordered the banishment of any woman, resident or foreigner, who became pregnant out of wedlock, while there was no such provision for the father of an extramarital child.[88] This followed the trend in German cities more broadly, where women were banished more often than men.[89]

The Jewish community of the second half of the eighteenth century treated the foreigner Lemele much as it did the children of those with resident rights who indulged in *früher Beischlaf* or extra-marital sex: it banned him from the main synagogue and prohibited him from wearing the *Schabbesmantel*, a black cloak worn by almost all Jewish adult males on the Sabbath as a way of honoring the day.[90] This type of social exclusion was similar to the punishment meted out to Isaac Bing and his wife, Pesle, both of whom were from well-established Frankfurt families.[91] Pesle gave birth to a child within a month of their wedding, prompting a response from the Jewish community. The community prohibited Isaac from wearing the *Schabbesmantel* for two years and prevented him from ever receiving the honorary title of *ḥaver* (Heb., lit., "friend," here a term for a learned, respected person).[92] As for Pesle, she was prohibited from entering the women's section in any of the main synagogues in Frankfurt for three years.[93] As in the case of Lemele, the couple's honor was tarnished but they were not forbidden from living in Frankfurt.[94]

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87 On changing attitudes, and their long-term ramifications, towards children born out of wedlock and punishing women in particular in late sixteenth and early seventeenth-century Frankfurt, see Boes, *Crime and Punishment*, 15–17.

88 See Segall, "Ḥomer le-pinkas ha-kahal," no. 320 (1675), sections 29–30.

89 Kamp, *Crime, Gender*, 260.

90 "RHR, Decisa, K2135," bundle 7. The sources do not specify how long this was to be applied, nor do they mention whether Fradche was censured for her act. On the *Schabbesmantel*, see Pollack, *Jewish Folkways*, 91–93. Also see National Library of Israel, Jerusalem MS Yah. Heb. 143 (Fürth, 1738), fols. 4r, 18r, and 23v. Prohibiting the wearing of the *Schabbesmantel* as a form of punishment was also done in contemporary Metz. On this, see Berkovitz, *Law's Dominion*, 87 n. 87. Regarding removing signs of honor on account of sexual transgressions, see Hull, *Sexuality, State, and Civil Society*, 83–84.

91 Isaac Bing's family had lived in Frankfurt for generations and his father was considered knowledgeable in rabbinic literature ("Frankfurt Memorbuch," fol. 361r, p. 720). On the family's history in Frankfurt, see Ettlinger, "Ēlē tōldōt," 27.I.1797; 24.VIII.1781; 12.II.1741. With respect to Pesle Goldschmied-Kassel, see 10.II,1814; 15.III.1796; 14.XII.1772; 19.VII.1704.

92 Note that a 1769 ordinance from the Jewish community of Metz on the issue of pre-marital relations was much more onerous. See Litt, *Jüdische Gemeindestatuten*, pp. 370–371, no. 43.

93 Segall, "Ḥomer le-pinkas ha-kahal," no. 498 (1788), connected a communal ruling from 1796 to this same type of misconduct. The 1796 case, involving Nathan Pfann, whose father was a notary and played a role in the Bamberger/Kann case, was added to the Frankfurt *Pinqas* on the page facing the Bing case (fols. 274r [Bing], 273v [Pfann]), suggesting a connection between the two (see Kaplan, *The Patrons and Their Poor*, 23). Ettlinger, "Ēlē tōldōt," 18.VI.1818, was of a different view and believed that Nathan and his wife, Cheila Kann, had married in January 1781 and already had 2 children before 1796.

94 The case of the aforementioned Hanle Fulda (1775–1776) was not a straightforward case of premarital relations because it involved serious deceit. Born in Frankfurt, she was raised by her grandparents in Hamburg and did not have resident rights in Frankfurt. She was in an advanced state of pregnancy from a man other than her Frankfurt resident husband-to-be when she married. Her husband, and everyone else, only discovered this after the marriage (see Kasper-Marienberg, "Jewish Women at the Viennese Imperial Court," 176–192). Also see Kasper-Marienberg, "From Enlightenment to Emancipation," 194–195.

Bamberger subsequently left Frankfurt, at least temporarily, to become a provisioner for the Franconian Imperial Circle (Fränkischer Reichskreis).[95] When he returned to Frankfurt, he managed to rent a house in the Judengasse in 1765, although his right to do so was challenged by the Jewish community before the Frankfurt municipal court.[96] Bamberger then asked to be admitted as a citizen of the Jewish community since he believed that he had fulfilled both his Christian and Jewish penance. However, his request was denied.[97] Bamberger thought that the Jewish community rejected his application because they were jealous of the success that he had achieved in his business dealings.[98] Aryeh Segall has suggested that the community may not have wanted a man who had had pre-marital sexual relations living in town.[99] However, pre-marital relations seem to have been relatively common and there may have been other reasons for the community to reject Bamberger's application.[100]

Bamberger appealed to the municipality of Frankfurt to force the Jewish community to admit him, claiming that he met all the official requirements (residency, financial capital, and a spouse from Frankfurt).[101] The municipality provisionally acceded to his request in 1765 and gave a final order to the Jewish community to admit him in 1768. The Jewish community appealed the decision to the RHR, but its request was rejected and around 1770 Bamberger became an official member of the Jewish community of Frankfurt.[102]

See, too, the case of the local cantor, Saul. A Polish Jew who had taken up a position in Frankfurt, Saul was accused of having sexual relations with local women and of impregnating one of them. Although the community came to an agreement with him to leave Frankfurt, he remained there, took up another profession, died there, and ultimately received a respectable entry in the community *Memorbuch*. See the material in Fram, *A Window on Their World*, 542–552, and Kasper-Marienberg and Kaplan, "Nourishing a Community," 328–329.

95 Jews had assumed an important role as provisioners in the region as early as the seventeenth century. See Israel, "Central European Jewry," 3–30.

96 See Kasper-Marienberg, *Vor Euer Kayserlichen Mayestät Justiz-Thron*, 377.

97 Whether Bamberger left Frankfurt for economic opportunity or as a means of penance is not clear. Cf. Segall, "Ḥomer le-pinkas ha-kahal," no. 497 (1796), where the Pfanns were told that the excommunication against them would be canceled if they went away for a year.

98 "RHR, Decisa, K2135," bundle 7.

99 Segall, "Ḥomer le-pinkas ha-kahal," no. 471, in his note to this section.

100 See Kasper-Marienberg, "Jewish Women at the Viennese Imperial Court," 183–184 with n. 26. Hanle, the Jewish woman who wanted residence rights in Frankfurt, claimed that there were others who had had pre-marital relations who were accepted for *Stättigkeit* in the Frankfurt Jewish community. On the frequency of premarital pregnancies in eighteenth-century Frankfurt, see Kamp, *Crime, Gender*, 170, 171.

101 There may have been additional requirements to attain resident rights, such as monetary payments. See Segall, "Ḥomer le-pinkas ha-kahal," no. 404 (1762). In the Jewish community of Metz, resident rights involved the payment of certain sums. See Berkovitz, *Protocols of Justice*, vol. 2, no. 119 (p. 518), from 1779.

102 Kasper-Marienberg, *Vor Euer Kayserlichen Mayestät Justiz-Thron*, 373–377. Also see Segall, "Ḥomer le-pinkas ha-kahal," fol. 243r, no. 471, from 24 May 1768. In May 1768 the case was still being argued in Frankfurt, but, surprisingly, it was already on appeal in Vienna.

Breakdown in the Agreement between Kann and the Bambergers

It did not take long for problems to emerge in the Kann-Bamberger agreement. The bills of exchange that collateralized the first part of the loan were drawn up in Fürth on 5 January 1777 by Joel Löb Bamberger, likely a relative of Lemele's who had married into a wealthy family there.[103] The bills of exchange, payable to Lemele, were sent to him in Frankfurt. He and his wife gave them to Kann before witnesses on 14 January. Kann then sent the bills of exchange to Vienna where they were to be redeemed, well in advance of the 5 March payment date.

Kann's agent in Vienna, Moses Koblenz, was to collect the money on Kann's behalf.[104] Koblenz was Kann's uncle (*Vetter*) and the Frankfurt Jewish community's representative at the Imperial Court. Kann had a special relationship with Koblenz that extended back many years. According to Koblenz's younger brother, who Moses helped support, Moses had spent part of his youth in the home of Leb's father, Ber Kann.[105] If so, Koblenz would certainly have been indebted to the Kann family for its kindness and would likely have been happy to be of service to Leb.

An imperial notary recorded that Koblenz presented the bills for payment on 21 January but one Simon Wolf Libna, who seems to have acted as agent for Joel Löb Bamberger, the issuer of the notes, refused to pay because they lacked what was by then a standard part of a bill of exchange, the *aviso*. The *aviso* was normally sent by the issuer of the note to confirm its validity and direct the agent on how it should be paid.[106] By the second half of the eighteenth century, it was a standard feature of bills of exchange across western Europe. The notary sustained Libna's objection, and the bills were rejected, after which Koblenz filed a protest.[107] Protestations of bills of exchange were commonplace. In Marseilles, approximately 20 percent of the bills of exchange presented for payment by a merchant house in 1789

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[103] Joel Bamberger's father-in-law, Israel ben Kalman Lichtenstadt of Prague (d. 1771), established a study hall in Fürth. When Joel's wife, Yentel, died in 1763, her father donated the funds to build an orphanage in the town. See Löwenstein, "Memorbücher," 89, 91.

[104] Koblenz lived in Eisenstadt, about 50 km south of Vienna. In October 1772 he was given a three-year appointment, retroactive to April of that year, to be the agent of the Jewish community of Frankfurt to the RHR. He was to be paid 500 reichsthalers annually, 400 reichsthalers in salary and 100 reichsthalers for expenses. Kann was on the committee that approved the appointment (see Segall, "Ḥomer le-pinkas ha-kahal," no. 435 [1772], and the material cited by him). Also see Kasper-Marienberg, *Vor Euer Kayserlichen Mayestät Justiz-Thron*, 105–108.

[105] See Koblenz, *Mafteaḥ ha-yam*, fol. 3b.

[106] See Beck, *Tractatus novus vom Wechsel-Recht*, 60–62. Also see Santarosa, "Financing Long-Distance Trade," 714 n. 42.

[107] "RHR, Denegata Recentiora, K390-1," bundle 34, fols. 37r–57v. The protest had to be written in the location of the payer and had to include the contents of the protested bill and the reason why it was not paid (see Santarosa, "Financing Long-Distance Trade," 698). Registering the protest with a public official certified that the bill had not been paid and allowed the bearer to sue the issuer or any endorser in the future. See Aust, "Between Amsterdam and Warsaw," 49. Strict rules of presentation continue to exist to this day in the world financial system with respect to letters of credit.

were protested and, in the following year, about 44 percent of them were protested.[108] Many protested bills were paid in due time.[109]

The bills of exchange were returned to Frankfurt and on 30 January, the Bambergers both signed a witnessed document stating that they had received the original bills of exchange with the protest from Kann. They admitted to not having "paid a cent" of their obligation to Kann, but maintained that the original loan contract with Kann, which Kann held, was still valid.[110] This would be tested further at the 1777 Frankfurt fall fair (*Herbstmesse*), when a second installment of 1,178 gulden, 22 kreutzer was due. The Bambergers missed this payment too.

This prompted Kann to take legal action.

Frankfurt Municipal Court Trial

On 5 December 1777, Kann filed a complaint with the Frankfurt municipal council (*Schöffenrat*) against the Bambergers.[111] There is nothing to suggest that Kann turned to the local rabbinic courts before going to the municipal court. Perhaps, as in Prague and Metz, it was customary in Frankfurt to take litigation regarding bills of exchange directly to the municipal courts. Kann's complaint to the Frankfurt municipal court included a copy of the Hebrew contract that had been drawn up with the Bambergers. The document was accompanied by a German translation prepared by Franz Christoph Bacher, a convert from Judaism who claimed to be a reader ("Lector") in Oriental languages and advertised his translation services in a local newspaper.[112] Kann explained that the Bambergers had not complied with the terms of the agreement and asked that it be canceled and he be allowed to collect the sums due to him from their property on which they had granted him a lien.[113] One week later, on 12 December, the magistrate issued a summons to the Bambergers to appear before the

108 Santarosa, "Financing Long-Distance Trade," 703.

109 Aust, *The Jewish Economic Elite*, 11.

110 "RHR, Denegata Recentiora, K390-1," annex 11, fols. 56r–57v; "RHR, Denegata Recentiora, K390-1," bundle 34, annex C, s.f.

111 "RHR, Denegata Recentiora, K390-1," bundle 34, fols. 1r–23v.

112 In an advertisement placed on 2 February 1759, Bacher offered to teach "apprentices and employees" Judeo-German and about the "secret numbers" (*geheime Ziffern*) of the Jews. He said that he could translate all "legal and business" material at a good price (transcribed in Belli, *Leben in Frankfurt am Main*, 4:139–40). The local magistrate used Bacher's services. See *Abdruck . . . 5. Octobris 1758*, 25, which refers to Bacher as a convert from Judaism. Bacher's translation business may not have been overly successful. In 1764, he seems to have had a company involved in setting up performances (see Körner, "„Evviva il nostro Prence"," 50 nn. 137, 146, 150, and 164). In 1788, he placed several advertisements for the sale of Batavia Arrack (a distillate from sugarcane molasses and fermented rice produced in Java, Indonesia), French liqueurs, and perfumes. See "Sachen die zu verkauffen," *Intelligenz-Blatt der freien Stadt Frankfurt*, 4 March 1788.

113 "RHR, Denegata Recentiora, K390-1," bundle 34, annex 1, fols. 1r–4v.

council, which generally functioned as a court of second instance, but was also the forum for more serious matters such as this, in which there was a large sum at stake.[114]

The *Authentica* Claim

The Bambergers did not appear before the court. They did not even answer the summons. The court issued a second summons which the Bambergers also ignored. Only after a third summons was issued on 25 January 1778 did Lemele Bamberger ask for a two-week extension due to his busy schedule. Finally, on 17 February 1778, Lemele and Fradche each submitted separate responses to the court.

Fradche asked to be exempted from the entire proceedings based on her status as a married woman. The claim was not without merit. In early modern German territories the so-called *weibliche Freiheit* ("female freedom") rule allowed married women – with some exceptions, such as women who ran businesses either alone or together with their husbands – to renounce any agreement in which they acted on behalf of a third party, including their husbands.[115] The principle stemmed from a decree in Roman law that allowed wives to take on debts but blocked them from incurring joint liability for the benefit of others.[116] This became known as the *authentica si qua mulier* decree and was ostensibly instituted to protect women from being "seduced and deceived in many cases of this kind, on account of the weakness of their sex," although there may have been other factors at play when the original law was promulgated in ancient Rome.[117] The rule only applied when the creditor knew of the woman's suretyship, and Kann certainly did for it was written in the contract. The *authentica si qua mulier* clause was part of Frankfurt municipal law (1578) and was in use in other jurisdictions into the eighteenth century.[118]

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[114] The jurisdiction of a court based upon the value of a civil case continues until this day. For example, in Israel, as of 2022, the court of first instance, the Magistrate's Court, only has jurisdiction in civil cases concerning up to 2.5 million shekels. Cases involving larger amounts are taken directly to the higher court, the District Court.

[115] See Wiesner, *Working Women*, 26–29. Kaplan, "Women and Worth," 105–107, offers insights into the use of the wife exemption clause in Jewish communities as well. For sources that specifically deal with the legal status of Jews in German-speaking lands in this matter, see Beck, *de juribus Judaeorum*, chap. 4, sec. 2, page 37, and Uhl, *De Ivre*, 7.

[116] See Mommsen, Krueger, and Watson, *The Digest of Justinian*, bk. 16.1.2.1; the *Senatus Consultum Velleianum* as discussed in Frier, *The Codex of Justinian*, bk. 4.29, particularly §18, 21, 23 (2-3), as well as Asser, "Complex and Difficult Questions," 109–110.

[117] Mommsen, Krueger, and Watson, *The Digest of Justinian*, bk. 16.2.2. Also see Zimmermann, *The Law of Obligations*, 145–148, 150–151. Cf. Benke, "Gender and the Roman Law," 228–234, for what he himself admits is a more "daring" approach. On the use of undue influence, see Fehlberg, *Sexually Transmitted Debt*, 24–25.

[118] On its use in Frankfurt, see Amend, "Frauen in der handelsrechtlichen Jurisdiktion," 126–134. On the use of this rule in regions of Holland, see Asser, "Complex and Difficult Questions," 105–114.

Despite the written rules, the *authentica* rule was often ignored in early modern German-speaking lands in order to allow women to function in the marketplace and to protect creditors.[119] In Frankfurt the clause did not apply in specific circumstances, such as when a woman left a pawn with the creditor or, as noted, ran a business together with her husband.[120] It was not uncommon for women to invoke this clause in court, yet it is not clear that the rule was still in effect in Frankfurt in the 1770s.[121] In his report, the magistrate of Frankfurt noted that legal scholars had argued for and against the use of the exemption, suggesting that there was some uncertainty about it. There was also a question whether Jewish women in Frankfurt could invoke the *authentica* clause.[122] Common practice in Frankfurt was to consider all Jewish women as involved in commerce and not allow them to repudiate responsibility for their husbands' debts to Christian merchants. To challenge this, Jewish women generally had to appeal to higher courts.[123]

In the 1720s two Jewish women from Frankfurt submitted an appeal to the RHR regarding their right to invoke the *authentica si qua mulier* clause. Following the custom in Frankfurt, the RHR ruled that a Jewish woman could not invoke the rule in a dispute with a Christian creditor.[124] The Frankfurt municipal courts appear to have followed the lead of the RHR in not allowing Christian creditors to be harmed by rules protecting the rights of Jewish women. In 1754, the Frankfurt Jewish community submitted a German language draft of regulations dealing with a broad range of internal administrational procedures called the *Reglement* to the emperor.[125] In a commentary to the *Reglement*, a Frankfurt city jurist noted that the local custom followed the precedent established by the RHR and did not accept "*separatio bonorum et privilegia dotis et illatorum*" in cases between Jewish debtors and Christian creditors.[126] A similar case regarding the rights of Jewish women was brought before the second supreme court of the Holy Roman Empire, the *Reichskammergericht* (RKG) in Wetzlar. The RKG seems to have followed the letter of the law rather than custom and recognized the right of Jewish women to invoke the *authentica* rule and protect themselves and their dowries from their husbands' Christian creditors.[127]

The Bambergers may not have had to seek out legal advice to invoke the clause. The contradictory rulings of the RHR and the RKG regarding the rights of Jewish women were probably known in the Frankfurt Judengasse. As for non-Jewish women, every Jewish merchant

119 Wiesner, *Working Women*, 30–31.
120 Amend, "Frauen in der handelsrechtlichen Jurisdiktion," 128–129, Wiesner, *Working Women*, 26–30.
121 See the cases cited in Amend, "Frauen in der handelsrechtlichen Jurisdiktion."
122 "RHR, Denegata Recentiora, K390-1," bundle 34, fols. 11v–12r.
123 See Schmitt, *Säuberlich banquerott*, 205–207.
124 Regarding the case, see "RHR, Decisa, K2590 (Alt F 157)." The decision was rendered in 1725.
125 See Blum, "Die Frankfurter Taqqanot," 31–35; Gotzmann, *Jüdische Autonomie*, 476; Kracauer, *Geschichte der Juden in Frankfurt*, vol. 2, vols. 2, 204–211; Kracauer, "Die Kulp-Kannschen Wirren," 46, kindly pointed out to us by Dr. Johannes Wachten; Segall, "Ḥomer le-pinkas ha-kahal," sec. 402 (1749), subsection 5, first note. It is unknown if these rules were ever instituted.
126 See "Frankfurt Reglement, 1754," sec. § 34.
127 Schmitt, *Säuberlich banquerott*, 207, 287–289.

who extended credit to Christians would have had to have known of the *authentica* exemption. Yet there was no supreme court ruling regarding disputes between a Jewish woman and a Jewish creditor and this left a measure of legal doubt which the Bambergers pursued. Fradche Bamberger may have made a *kinyan sudar* and signed the agreement with Kann, but she claimed that she was not able to help her husband when he dealt in bills of exchange and sold goods on commission. According to her, Lemele had never had a business that she could take an active role in, such as a store.[128] Fradche maintained that she was not what an Augsburg ordinance from 1432 called a "market women" (*Krämerin*) and therefore could not be held liable for her husband's debts.[129] Fradche specifically invoked the *authentica si qua mulier* clause and asked to be dismissed from the proceedings, a request that she herself signed.

Fradche did not limit the basis of her claims for an exemption to general law. She also invoked Jewish law, yet she made no mention of a specific written source to substantiate her position. According to Fradche, in intra-Jewish claims the right of a Jewish woman to exclude herself from such a case was beyond doubt, and she expressed surprise that a man like Kann would try to hold her liable for the debt.[130]

The claim was bold but not entirely accurate.

It was common practice in some contemporary western European Jewish communities, including Frankfurt, for women to co-sign debt agreements with their husbands to make it easier for them to obtain credit.[131] Jewish creditors could be wary of advancing funds to married men, for every married Jewish man had at least one prior lien against him: the marriage contract of his wife (*ketubbah*). The *ketubbah*, signed at the time of marriage, guaranteed wives a specified amount in the event of her spouse's death or divorce. The wife's financial claim against the husband preceded those of creditors and this made some of them uneasy. From at least the early seventeenth century in eastern Europe, and later in the century in western Europe, a legal workaround developed through which wives agreed to subordinate their rights to those of subsequent creditors.[132] They did so by signing on the debt agreement together with their husbands, and specifically by signing *before* their husbands, to make it

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128 Kann's wife, Hawele, was active in her husband's business. Her entry in the "Frankfurt *Memorbuch*," fol. 289v, p. 577, notes that she engaged in trade and her husband relied on her in this regard. It adds that she was able to write well and knew "mathematics" (*tishboret*; on its eighteenth-century meaning, see https://maagarim.hebrew-academy.org.il/Pages/PMain.aspx?koderekh=101518&page=1, accessed 14 October 2021). Perhaps she managed the record keeping. As we will see, she eventually took over the business.

129 Wiesner, *Working Women*, 27.

130 "RHR, Denegata Recentiora, K390-1," bundle 34, annex 15, fols. 61v–63v.

131 See the discussion in Berkovitz, *Law's Dominion*, 336–343. An example of the use of this clause in contemporary Frankfurt appears in Fram, *A Window on Their World*, fols. 137, 62r, line 6. See too Segall, "Ḥomer le-pinkas ha-kahal," nos. 542, 543, both from 1793.

132 See Joshua Falk, *Perishah*, Ḥoshen mishpaṭ 131 n. 12, whose comments suggest that some form of the arrangement was already in use in his time and place (d. Lviv, 1614).

clear that they had agreed to the terms of the contract.[133] Fradche was a signatory to the copy of the debt agreement that was sent by Kann to the RHR and her signature appeared on the contract before that of her husband.[134] Fradche wanted to excuse herself from the legal proceedings on the basis of her status as a married woman, but according to both Jewish law and local custom, she was a joint debtor in the deal at hand.

Lemele Bamberger's Response

Lemele Bamberger, too, rejected Kann's claims. While he did not deny the existence of the contract and that he owed Kann funds, Lemele declared that there had never been a loan agreement between him and Kann but rather a partnership. Lemele explained that the aforementioned *heter ʿisqa'* was not a debtor-creditor arrangement but a joint venture in which Kann provided the capital, the Bambergers provided the labor, and all agreed to share in the profits and losses.[135]

Lemele's claim was not without some basis in Jewish law, for the Talmud explains that an *ʿisqa'* was a partnership in which both the investor and the recipient of the funds had joint liability.[136] The contract that Kann presented to the court noted that Kann was to pay the Bambergers a token amount as wages for their labor, which was in keeping with the requirements of a *heter ʿisqa'*.[137] The same contract stipulated that the Bambergers would share half the profits with Kann, but gave them the option to pay him a 5% return on the principal and keep the profits for themselves. Lemele maintained that since he lost money in this business endeavor, Kann had to share in the losses and his claims for payment were baseless. Lemele told the court that it could confirm his losses with "city hall."[138]

Lemele Bamberger's claim of a partnership was undermined by his having paid Kann 150 gulden during the previous months. This would appear to have been an installment payment on the outstanding interest on the loan rather than a share of the profits.[139] Indeed, in his petition to the court Kann argued that this was a telltale sign that Lemele had accepted the

133 Berkovitz, *Law's Dominion*, 338, points out that an ordinance of the Jewish community of Metz from 1769 stated that a wife did not have to sign the loan agreement to be considered a joint debtor. Regarding the rationale for the wife to sign before her husband, see Gulak, *Oẓar ha-sheṭarot*, xliii–xlvi.

134 See "RHR, Denegata Recentiora, K390-1," Annex D.

135 "RHR, Denegata Recentiora, K390-1," bundle 17.

136 B.T., *Baba' meẓi'a'* 104b.

137 Regarding the need for payment, see Gamoran, *Jewish Law in Transition*, 134–135, 148–149, 155–156.

138 "RHR, Denegata Recentiora, K390-1," first instance file, no bundle number, fols. 33r–v. The original contract included a stipulation for the Bambergers to declare their profit but there was no mechanism in place for itemizing loss.

139 The exact date of the payment of the 150 gulden is not noted in the record, but a full year had not yet passed. Five percent of 3,177 is 158.85, meaning that 150 gulden could have appeared to be an interest payment.

loan agreement. In response, Lemele asserted that the 150 gulden transferred to Kann was not an interest payment but rather a charitable donation that Kann had forced him to make and, as such, it could not be seen as sign of his acquiescence to a loan agreement.[140]

Kann must also have told the court about the bills of exchange that had not been paid in Vienna some months earlier, for Lemele specifically dismissed any legal significance that these bills might have had. Offering an affirmative assertion, Lemele said that these bills of exchange were now outdated and as such had no bearing on the proceedings. Perhaps leery as to whether the court would accept this defense, Lemele returned to the argument that he and Kann had contracted a business partnership. Lemele reiterated that his losses in the venture with Kann were so great that there was no basis for any of Kann's claims and he owed Kann nothing. Accordingly, Bamberger asked that the case be dismissed.[141]

Kann entered his response to the Bambergers on 24 March 1779. Decrying Lemele's lack of knowledge of Jewish law and customs and his hollow excuses, Kann asserted that Lemele certainly knew the difference between a partnership and a *sheṭar ʿisqa'* ("business contract"). The latter was the only permissible way for Jews to take interest from each other and the phrase "half profit" was part and parcel of the agreement.[142] Yet Kann did not present the court with a copy of a *sheṭar ʿisqa'*. He only submitted a translation of the bills of exchange prepared by Bacher. Bamberger had disputed the validity and significance of the bills of exchange and presumably Kann wanted to show the magistrate that they were valid when they were presented for payment in Vienna.[143] Kann also challenged Fradche's use of *weibliche Freiheit* to free herself of financial responsibility. He explained that it was not the custom of the Frankfurt courts to recognize such a claim, but he did not substantiate his assertion with any legal reference or precedent.[144]

The court asked for the Bambergers' counter-responses and once again the Bambergers were slow to reply. They failed to answer the court the first and second time that they were asked to do so. Failure to respond to a third request would have meant that the court would have ruled without any further input from them. Ultimately, the Bambergers responded by asking for a four-week extension due to the upcoming Jewish holiday of Shavuot and Lemele's business-related travel.

On 23 June 1779, the Bambergers responded to the Frankfurt court. Fradche simply repeated her earlier claim for an exemption based on her gender and marital status. Lemele reiterated that the 150 gulden payment that he had made to Kann was not an interest payment and modified his explanation. Instead of maintaining that it was a forced donation as he had said earlier, he now described it as an advance payment to Kann towards possible

140 Bamberger claimed that the four ells that he gave to Kann were a charitable donation. The assertion was questionable since, as noted, the use of "four ells" was a formulaic way of transferring ownership.
141 "RHR, Denegata Recentiora, K390-1," bundle 34, annex 9, fols. 32r–36v.
142 "RHR, Denegata Recentiora, K390-1," bundle 34, annex 10, fols. 37r–57v.
143 "RHR, Denegata Recentiora, K390-1," first instance files, no bundle number, 1–23.
144 "RHR, Denegata Recentiora, K390-1," [bundle 13c], annex 10, fol. 43r.

future profits.[145] Most significantly, Lemele said that there was no need for a *shetar `isqa'* in the loan agreement for Jews could take interest from each other using a bill of exchange so long as the words *Zatt Hetter* (*ẓad heter*; Heb., "according to the permitted way") appeared in the contract. To support his contention, Lemele claimed that this was the rule according to Jewish law (*nach dem Reglement*).[146] While there is no such rule in *Shulḥan `aruk* or in the Frankfurt *pinqas*, there was a basis for Bamberger's claim.

When the Kann-Bamberger loan was recorded by Israel Schwarzschild, the aforementioned scribe of the Jewish community, he simply noted that the *`isqa'* had been made based on *ẓad heter* "according to the ordinance of the rabbis, of blessed memory."[147] This phrase, "*ẓad heter*," or some variation of it, was standard in records of intra-Jewish credit. When the sexton and cantor of the Frankfurt community, Hertz Wohl, and his wife Hannah took a loan at 5% interest in August 1774 from a Jewish lender, the record book said that it was "a partnership made in the permitted way" (*`isqa' `al ẓad heter*).[148] The record book of the Frankfurt Jewish community spoke of a perpetual charitable fund deposited with the community at 4% per annum return *`al heter `isqa'* ("according to the business allowance"), but again without any documentation of a *heter `isqa'*.[149] This was also the way in which interest-bearing loan agreements made in accordance with Jewish law were recorded by Rabbi Ḥayyim Gundersheim, a member of the contemporary rabbinic court in Frankfurt. In his court diary, Gundersheim wrote of loan contracts written *`al ẓad heter* without including a *heter `isqa'* in the record.[150] The expression "*`al ẓad heter*" was a shorthand method for affirming that the loan agreements satisfied the complex rules of Jewish law regarding loans to be returned with interest. Apparently, intra-Jewish credit was so common that few bothered to write out the entire *heter `isqa'* as it had been formulated in the early seventeenth century.[151] Instead, they simply wrote that it was a business partnership that was created according to the rules established by the rabbis and this sufficed.[152] The rabbinic court in Metz was no different. It recorded that loan agreements were written *be-torat `isqa' `al ofen ha-mo`il*, "as partnerships, according to the way that works."[153] The Metz court did not specify what was

145 "RHR, Denegata Recentiora, K390-1," first instance file, annex 16, fols. 63v–69r.

146 "RHR, Denegata Recentiora, K390-1," first instance file, annex 16, fols. 64r–v. Presumably Bamberger was not referring to the above-mentioned *Reglement* submitted by the community to the authorities in 1754 since there is no discussion of this matter in that collection (see "Frankfurt Reglement, 1754.") Here the meaning of the word appears to follow the French and mean "rule" or "ordinance."

147 Schwarzschild, "Pinqas ha-ne'emanut," fol. 160r.

148 Schwarzschild, fol. 109v.

149 Segall, "Ḥomer le-pinkas ha-kahal," nos. 495, 496.

150 Fram, *A Window on Their World*, nos. 43, 46, and 253.

151 See Samuel ben David Moses, *Naḥalat shiv'ah*, sec. 40. This abbreviated form of reference to the early seventeenth-century contract continues until today. See https://www.star-k.org/images/db//hetter-iska.pdf, accessed 22 August 2021. Also see Kaufman, *Leḥem ha-panim*, Qunṭres aḥaron, fol. 68a, § 1.

152 In modern Hebrew, the phrase "*ḥazal*" (an abbreviation for *ḥakameynu zikronam li-berakah*, "our sages of blessed memory"), refers specifically to talmudic rabbis. In eighteenth-century Frankfurt and Metz, it referred to previous generations of rabbis, from talmudic times onward.

153 Berkovitz, *Protocols of Justice*, 41, 138, and 384.

involved but summarized that everything had been done according to the rules of Jewish law. It is possible that Kann never submitted a copy of a *heter `isqa'* document to the court because there never was one.

Law Faculty Review

In their response to the Frankfurt municipal court, the Bambergers made an important procedural move. Instead of having the case adjudicated by the Frankfurt magistrate, the Bambergers petitioned that the case be sent to a law faculty for a decision. Bamberger offered no rationale for his request, and none was required, although later, in writing to the RHR, the Bambergers' lawyer would justify the request to send the file to a law faculty by saying that "there is probably no nation or religion in the world where customs are as uniform as among the Jews. They [i.e., the customs of the Jews] are well known at universities and probably better known than among the scholars of Frankfurt. A law faculty (*Juristen Facultaet*) is concerned with the laws of all nations. In university libraries one can find the law books of most nations (*Völcker*), the Jewish Talmud, *Coschen Hemischpat* [i.e., the civil law section in at least two major codes of Jewish law], and so forth that one would likely not find in Frankfurt outside the Judengasse."[154]

Every litigant had the right to ask that the case be taken out of the hands of the municipal court and sent to a law faculty for a decision. Litigants were required to pay for this procedure. The use of law faculties in civil litigation seems to have been almost commonplace.[155] For example, between 1744 and 1755 the law faculty of the University of Jena dealt with about 820 such cases per year.[156] The faculty did not hear the cases but based its decisions on the written materials presented to it. Law faculties were prepared for this, and professors were paid for their work.[157] A litigant could not choose the law faculty that the case was sent to and courts made efforts to hide the identity of the faculty to which it was sent out of fear that a litigant might send "gifts" to the faculty to help influence the decision.[158]

The Bambergers' request may have been motivated by a perception on their part that the Frankfurt court favored Kann's position. If so, they would have been correct. Even though the Frankfurt magistrates were Protestants, experience had familiarized them with the efforts

154 "RHR, Denegata Recentiora, K390-1," bundle 17. The availability of legal sources in their libraries was an important criterion in determining faculties' legitimacy for deciding legal cases. See Falk, *Consilia*, 21–34.

155 Appeals to law faculties were also possible in criminal cases but, at least in the seventeenth century, were rare in Frankfurt. See Boes, *Crime and Punishment*, 48.

156 See Amend, "Die Inanspruchnahme," 80–81.

157 On the extent of *Aktenversendug* (lit., "sending of files"), see Oestmann, "The Law of the Holy Roman Empire," 757. On payments, see Falk, *Consilia*, 43–49.

158 Amend, "Die Inanspruchnahme," 91. After the decision was given, the identity of the faculty often became known, as decisions were sometimes published with the litigants' names anonymized.

of both Jews and Catholics to avoid transgressing religious prohibitions.[159] The idea of a technical, if not casuistic, solution to the prohibition on taking interest was well known to them. The Frankfurt magistrates were experienced in adjudicating financial transactions and had often seen these sorts of contracts between Jews, as well as between Catholics. Moreover, Friedrich Esais von Pufendorf (d. 1785), who served as a justice on the high court of appeal (*Oberappellationsgericht*) in Celle (Electorate of Hannover, Lower Saxony), had written a legal work in which he not only discussed the *heter ʿisqa'* but offered a German translation of one that included the liability of both a husband and wife.[160] The Frankfurt magistrates cited this work and were aware that the *heter ʿisqa'* was used in other Jewish communities to create loan agreements, not partnerships. In his report to the RHR, the magistrate compared the formulae used in contracts written by Jews to circumvent religious restrictions on usury with those used by canonists.[161] The Frankfurt court saw the *heter ʿisqa'* as a legal formality to allow a usurious loan, not a partnership contract that allowed the debtor to decide whether to share in the profits or pay the agreed-upon interest payments. The debtor had no choice but to pay the stipulated amount of interest. For the magistrates, this was all self-evident and, from their perspective, the performative act of the *Mantelgriff* confirmed that the parties had agreed to this. Given this perception, the magistrates would almost certainly have decided the case in Kann's favor.[162] If the Bambergers sensed any of this, they had little to lose beyond the cost of the appeal in asking to send the case to a law faculty.

There may also have been substantive reasons for the Bambergers to send the case to a law faculty. The Bambergers or their legal counsel may have known that files sent from Frankfurt to law faculties were generally directed to Protestant universities such as Gießen, Tübingen, Leipzig, and Halle.[163] Less concerned than Catholics with the issue of interest-taking, they may have seen the Bambergers' claim with greater equanimity.[164] Moreover, academics may have focused on the letter of the law rather than the everyday practices of Jews and Catholics. Thus, members of the law faculty may have been more sympathetic to the Bambergers' claims that a *heter ʿisqa'* was a business partnership in which there was shared risk. Similarly, the law faculty might have given more favorable consideration to the invocation of the

159 Hsia, *Social Discipline in the Reformation*, 182, noted that minorities, even tolerated Christian minorities, were excluded from power.

160 See Pufendorf, *Friderici Esaiae a Pufendorf*, 203–207. Celle was the seat of Brunswick-Lünenburg. Appeals from this region could not be brought to Vienna but were heard in the court in Celle. See Sydow, "Das Verhältnis," 271–272. Also see Stodolkowitz, *Das Oberappellationsgericht Celle*. On Pufendorf, see Biographie, "Pufendorf, Friedrich Esaias - Deutsche Biographie."

161 "RHR, Denegata Recentiora, K390-1," bundle 7, fol. 7r. Catholics still had religious concerns regarding usury in the eighteenth century. Although the Fifth Lateran Council (1512–1517) allowed "credit organizations" to take a "moderate sum" of interest (Jones, *Reforming the Morality of Usury*, 34–36), in 1745 Pope Benedict XIV condemned interest taking in his encyclical *Vix pervenit*, forcing Catholics to use a legal fiction for intra-Christian credit. The so-called "triple contract" used by Catholics to avoid the prohibition of interest taking is outlined by Noonan, *Scholastic Analysis of Usury*, 202–229.

162 "RHR, Denegata Recentiora, K390-1," bundle 7, fols. 3v–8v.

163 Amend, "Die Inanspruchnahme," 90.

164 Amend, 91.

authentica clause by a Jewish woman. Under Jewish law and according to the custom of the non-Jewish community in Frankfurt, Fradche was liable for her husband's debts. Perhaps at a law faculty Roman law would take precedence over local custom, just as it had at the RKG. Even if the law faculty decided against Lemele Bamberger's claim regarding the *heter ʿisqa'*, it could still decide in favor of his wife's right to protect her dowry.[165]

The Bambergers' efforts to move the site of judicial jurisdiction were an important stage in the case and show familiarity with local legal procedure. It demonstrates that Jews, at least those who interacted with non-Jewish society on a regular basis, were well informed and knew how to hire professionals who could provide them with information and advise them how to best advance their cases through the non-Jewish legal system.[166]

Academic justice was not quick. Six months later, on 24 December 1779, the law faculty of the University of Wittenberg dismissed the case due to lack of documentation and clarity. The faculty could not determine whether the use of the half-profit/half-loss language in the contract or the transfer of four ells of property to Kann to create a lien on the Bambergers' assets was anything but formulaic. The place of the bills of exchange in the entire transaction was also unclear to them. The law faculty noted that Kann could not prove that the 150 gulden payment that Bamberger had made to him was really an interest payment and not simply an advance on future profits as Bamberger maintained. The one thing that the faculty found to be beyond doubt was that Fradche had the right to remove herself from the case on the basis of Roman law, German precedent, and a German legal book written by Johann Heinrich von Berger (d. 1732) who had been a professor of law in Wittenberg and a Protestant Imperial Aulic councilor.[167] The Frankfurt court publicized the decision – without any rationale – with a remark that it was based on "the advice of external legal scholars," that is to say a law faculty, which was an unusual admission.[168]

Moving the Case to the RHR

Kann was left with no immediate recourse but as a resident of Frankfurt, he, like non-Jews, could turn to both imperial supreme courts, the *Reichskammergericht* in Wetzlar, and the *Reichshofrat* in Vienna.[169] Although Jews often litigated at the court in Wetzlar, like many

165 Schmitt, *Säuberlich banquerott*, 205–207.

166 The hiring of non-Jewish lawyers by Jews was not new. See Rowan, "Johann Zasius," 198–201.

167 "RHR, Denegata Recentiora, K390-1," Rationes Decidendi (not foliated), with "RHR, Denegata Recentiora, K390-1," [bundle 13c], annex 18, fols. 70v–72v, and Berger, Berger, and Bach, *Oeconomia iuris*, bk. III, tit. III par. 8, notes 4, 5.

168 "RHR, Denegata Recentiora, K390-1," [bundle 13c], annex 18, fol. 70v. Regarding the Frankfurt court's general practice of not mentioning that the decision was that of a law faculty, see Amend, "Die Inanspruchnahme," 92–93.

169 Litigants, other than those who were under the exclusive domain of the emperor, such as territorial princes, were entitled to a three-stage proceeding. For the Jews of Frankfurt, the court of first instance

of his fellow Frankfurters, Kann chose to turn to Vienna, perhaps because imperial commissions that worked in Frankfurt to solve constitutional conflicts in the first half of the eighteenth century had made the Viennese court more visible to Frankfurters.[170] The Frankfurt Jewish community maintained a representative at the Imperial Court in Vienna throughout the eighteenth century to help advance cases before the RHR. Perhaps most importantly for Kann, he had a personal connection to the RHR because his family members had litigated before it on behalf of the Frankfurt Jewish community in the past.[171]

Appealing a case to the RHR involved several steps. One had to pay an appeal fee (*Appellationsgulden*). There had to be a notarized and witnessed agreement to take an oath (*Appellationseid*) that the case being brought to the RHR was neither fraudulent nor being brought to another court simultaneously. One had to leave a financial deposit (in this case, it was an unspecified amount) and make an official request that the case files from the court of first instance, in this case the municipality of Frankfurt, be delivered to the RHR.[172] All this had to be completed in Frankfurt within 10 days of submitting the request for an appeal and before the material could be brought to Vienna.

Litigants were not expected to know all the intricacies of the process and it was assumed that they would hire professionals – agents, lawyers, or other representatives – who would navigate the complexities of the system for them at the local level and in Vienna. Like other Jews involved in litigation before the RHR, Kann and the Bambergers retained non-Jewish lawyers. Kann hired Johann Christoph Stoeß to take care of his filings. As for the Bambergers, defendants did not have to pay the appeal fee or leave a deposit, but they too needed someone in Frankfurt to assist them with the legal work and they hired Johann Friedrich Münch to do so.[173] Stoeß and Münch were both *procuratores* at the local Frankfurt court.[174] Lawyers by training, they specialized in writing the briefs and preparing the paperwork necessary for the *advocat* to present to the court.[175]

On 7 January 1780, Kann completed the requirements for the appeal to the RHR. However, it would take another five months for more substantial materials from the parties to arrive in Vienna, in part because one of Kann's lawyers, perhaps Wilhelm Philipp Seyfried,

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was the rabbinic court. After that, they could appeal to the magistrate's court in Frankfurt, and then to one of the imperial supreme courts. See Ortlieb, "The Holy Roman Empire," 93.

170 Jews used the Wetzlar court, particularly in cases of bankruptcy (see Schmitt, *Säuberlich banquerott*, 116–121; Riemer, "Hamburg und Frankfurt," 277; and Baumann, "Jüdische Reichskammergerichtsprozesse"). Regarding the imperial legal presence in Frankfurt as a reason for the tendency to turn to Vienna, see Ortlieb, "Frankfurt vor dem Reichshofrat," 74.

171 Kasper-Marienberg, *Vor Euer Kayserlichen Mayestät Justiz-Thron*, 487, s.v., "Kann."

172 "RHR, Denegata Recentiora, K390-1," [bundle 13c], annex 19, fols. 72v–81v. There were allowances made for a Jew taking an oath. Here it was specifically assumed that Kann would take an oath before a Torah scroll, not on the New Testament.

173 "RHR, Denegata Recentiora, K390-1," [bundle 13c], annex 21-22, fols. 82r–85v.

174 Stoeß was the more experienced of the two, having practiced law since 1766. Münch only began in 1774. The two were listed as *procuratores bey hiesigem judicio* in *Neues genealogisches 1779*, Frankfurt am Main, 27.

175 On the differences between *procuratores* and *advocati*, see Süß, *Partikularer Zivilprozess*, 89–92.

was very busy.[176] These delays did not mean that Kann sat by idly. Kann hired a local imperial notary who would – or already did – specialize in bills of exchange, Johann Wilhelm Marr.[177] Kann asked Marr to bring the Hebrew and German versions of the contract to "the local Jewish scholars" whom he listed as Jacob Schames, Abraham Trier, Samuel Drach, Mayer Salomon Schiff, and Heyum Joseph Gundersheim. Kann specifically requested that Nathan Salomon Maas be excluded from the evaluation committee because he was related to Bamberger. Marr was to ask them if the contract between the Bambergers and Kann had been drawn up according to Jewish law and custom and then to attest to what they replied.

On 14 April 1780, Marr made his way into the Frankfurt Judengasse. At 2 p.m., he met with Schames, who told Marr that the contract was correctly written, and that Mrs. Bamberger had renounced her marital privilege when she agreed to the transaction by taking the *Mantelgriff* before her husband. Marr then went to the other scholars, each of whom concurred with Schames.

It is worth mentioning that Marr paid a private visit to each of these individuals. Marr was relying on their collective experience to strengthen Kann's case. He may not have known that he could have saved himself time and effort by meeting all of them at once at the Frankfurt rabbinic court where they all served as rabbinic judges (*dayyanim*). Kann did not instruct Marr to visit Rabbi Pinhas Horowitz, chief rabbi of Frankfurt and the highest-ranking rabbinic authority in the city. While Horowitz sat on the court from time to time, he was not a permanent presence there and would have been less familiar with daily business practices. Moreover, Horowitz came to Frankfurt from eastern Europe in late 1771, about five years before the original transaction between Kann and the Bambergers had taken place, and he was unlikely to have known how things were done in Frankfurt as well as the other rabbinic judges who had grown up in the region.[178]

Marr was then sent to the scribe of the community, Israel Schwarzschild, to ask him, based on his experience and "those of his forefathers who had also been scribes in Frankfurt," if he could verify that this was the traditional form of the contract.[179] Schwarzschild affirmed to Marr the tradition of writing the contract in this way. Marr subsequently went to the *Judenbeglaubten* to confirm with them who usually wrote these sorts of contracts and they told him

176 "RHR, Denegata Recentiora, K390-1," bundle 1, no folio. On Seyfried, see Dölemeyer, *Frankfurter Juristen*, 191, no. 612.

177 *Neues genealogisches 1779*, Frankfurt am Main, 25, listed Marr as a Frankfurt notary. He may already have been developing a subspecialty in bills of exchanges, as a few years later he would sign his name as "Wechsel-Notar" ("Intelligenz-Blatt," 15 February 1788). Herrmann, *Allemeiner Contorist*, 2:172, listed Marr as one of two "Wechselnotarien" in Frankfurt (also see *Neues genealogisches 1789*, Frankfurt am Main, 26). On the need for special accreditation for imperial notaries, see Wendehorst, "Zwischen Kaiser und Reichsständen," 348–349.

178 On Horowitz's background and arrival in Frankfurt, see Horovitz, *Rabbaney Frankfurṭ*, 144–151.

179 Marr seems to have been somewhat misinformed about Schwarzschild's forebearers. According to his entry in the Frankfurt *Memorbuch*, Schwarzschild was appointed notary and scribe of the Frankfurt Jewish community in 1741, when he was in his mid-twenties ("Frankfurt Memorbuch," fol. 340v). His father and grandfathers were not scribes. Their professions can be traced through Ettlinger, "Ēlē tōldōt," 20.II.1794.

that Schwarzschild did. Marr then went back to Schwarzschild and asked him to review the contracts to see that they were properly prepared, which Schwarzschild did. Marr signed and sealed his conclusions that very day.[180]

The notice of appeal that had been prepared in Frankfurt arrived in Vienna on 6 May 1780. Once received, the Viennese agents involved in the case had to produce proof of their licenses to act as representatives to the RHR. After this was acknowledged by the court, the appellant had two months to submit a bill of complaint. Kann's representatives did this on 20 July 1780. It took almost a full year for the RHR to take the next step in the process. In May 1781 the RHR sent a courteous request to the Frankfurt City Council asking for a report on the case, a common procedure when subjects appealed a decision of their local government.[181] Only on 30 April 1782 did the Frankfurt City Council send the material to Vienna.[182]

As in modern supreme courts, not every appeal submitted to the RHR was accepted by the court. Petitions were reviewed by a member of the court who then made his recommendations to his peers. Beyond the question of whether the case should be accepted, the court had to decide which laws would govern the case. No one doubted the jurisdiction of the RHR over the Jews of Frankfurt. The issue was whether the matter would be judged according to the laws of Frankfurt or halakah. To this end, one of Kann's lawyers, perhaps Seyfried, sent a memo to the RHR arguing that this case should be judged according to Jewish law.

> It is certain that Jews who have been received to a state and are made its subjects must be dealt with and judged according to the common and imperials laws and particularly according to the statutes and customs of the place in which they reside in cases other than their religious ceremonies, church laws [*Kirchen-Gesezen*] and common marriage, dowry, divorce, inheritance, succession, wills, and other conflicts and disagreements [*Irrungen*] they may have among themselves. However, it is also certain and without any doubt that in the exceptional cases just mentioned, Jews must be judged solely according to Mosaic laws, according to their own custom and to be judged *in foro* [lit., "in court;" i.e., they are to be judged according to Jewish law even if in a non-Jewish court]: [marginalium: Beck: *Recht der Juden* cap. IV. §4] Every territorial lord has, by the very fact of his reception and toleration [of Jews] in his land, given them the right to conduct cases of their ceremonies and legal matters [*in actibus suis ceremonialibus ac forensibus*] according to Mosaic Law, that is the law that is particular to Jews, according to its interpretation and any customs among them that derive from it. [The Mosaic Law] limits [*derogirt*] the common law and therefore a Christian judge too is obligated and bound to apply it in such cases […] there is no doubt but that the customs that are derived

180 "RHR, Denegata Recentiora, K390-1," bundle 3, annex 12.
181 Sellert, *Prozessgrundsätze*, 182, 183.
182 "RHR, Denegata Recentiora, K390-1," bundle 7, fols. 1–17, annex 1-4.

> from the oldest times of Jewish communities [*Judenschafft*] are grounded in its constitution and must be applied and made the main basis of the decision in the case at hand.[183]

The justice of the RHR who reviewed the case had to consider the next steps. It was up to him to decide whether the case should be accepted at the RHR and, if so, to determine the choice of laws that would govern the case. In a short statement that he drafted to present orally to his colleagues during one of their sessions, Christian August von Seilern wrote:[184]

> Since both contesting parties are Jews and the complaint is based on a Jewish instrument, I am absolutely sure [*ganz sicher*] that the decision about it also has to be made according to their laws. Given this presumption, all that matters is what kind of contract [*Starr Brief*] it is, and if the law faculty in Wittenberg made the correct decision [*wohl gesprochen*] simply to dismiss the case and order the appellant to pay costs because he did not prove the statutory laws and the instrument [i.e., the contract] was unclear […]. If the contract at hand is an *instrumentum quarentigiatum* [not to be confused with *instrumenta guarentigiata*; it was like a registered bond that allows summary execution – Authors' note] or *Isky* [i.e., a loan agreement] or a *starot Schutfuß* [partnership contract] cannot be concluded from its tenor. Therefore, we have to rely on the testimony of the magistrate and of the Jewish scholars who affirm to the first and declare the implications for the woman as clear […] the law faculty, in my humble opinion, would have been obliged, because they should have known that if Jews litigate with Jews in a case based on a Jewish instrument they cannot be treated according to *ius commune* [i.e., the legal system based on Roman, canon, and feudal law that was used in much of Europe], to address this doubt by inquiring of the magistrate before they order the litigant to pay the expenses and instead order him to bring what he brings only now in the appeal court. Since we are clear about these preliminary questions, and since there is no question here about half profit, half loss or that the defendant's wife is liable as well, the law faculty's decision cannot stand up to its own principles and reasons […] which is why I have no hesitation, *ex adductis rationibus reformatorium* to decree that the defendant is guilty to pay the disputed capital of 3278 fl. 22 [kreutzer] back to the claimant with 5 percent interest …"[185]

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183 "RHR, Denegata Recentiora, K390-1," bundle 8, no folio. The marginalium refers to the source of much of this citation, Beck, *de juribus Judaeorum*, 38–39. A subsequent marginalium provided by the lawyer provided citations to earlier legal sources cited by Beck to substantiate his positions: Beck: *l[iber]. c[apitulum] ibique alleg[atum]:* l: 80. D[!]. *de reg. jur*. Cap: 34 *de reg. jur*. in 6to/ Trentacinq[ue]. et Schneidew[e]in. This helped support the lawyer's argument by showing that this was a longstanding legal tradition. Alessandro Trentacinque (d. 1599, L'Aquila) and Johannes Schneidewein (d. 1568) were both considered important enough jurists to warrant multiple republications of their works, including in Frankfurt.

184 On von Seilern, see von Wurzbach, "Seilern, Christian August Graf," 19.

185 "RHR, Denegata Recentiora, K390-1," "Relatio," no bundle, no folio.

Swayed by this opinion, the RHR accepted the case on 16 August 1782. It took two more months until the agent of the Frankfurt City Council in Vienna met Kann's agent to inform him that the case had been accepted. Finally, on 30 October 1782 at 1 p.m., a Frankfurt notary came with two non-Jewish witnesses to the Bamberger residence in the Judengasse to serve the couple with notice of the appeal.[186]

Up to this point the entire onus of the appeal had been on Kann and his representatives. Kann was obligated to inform the Bambergers of his actions in turning to the RHR, but the Bambergers did not need to do anything. They were passive participants in the process. The appeal changed all this, yet the Bambergers did not submit any sort of official response to the court until July 1783.[187]

On 25 July 1783 the Bambergers' lawyer filed their objections to the appeal. The Bambergers' refuted each of Kann's claims point by point. In some instances, they rejected Kann's arguments out of hand, simply saying "*ohne allen Beweiß,*" namely, that the claims were without grounds. Citing city ordinances from Frankfurt, they continued to reject any attempt to hold Fradche Bamberger liable for the debt. They also denied that anyone could question the decision of a juristic university faculty known to be experts in the law. As noted above, the Bambergers claimed that the Wittenberg faculty members were familiar with both Roman and Jewish law and had all the necessary legal reference books, including "the Jewish Talmud" and "*Coschen Hemischpat*" in their library.

Central to the Bambergers' petition that the RHR dismiss Kann's appeal was their claim that the Justinian Code specifically stated that the affairs of Jews were to be judged according to the common laws of the Roman Empire.[188] They rejected Kann's assertion that later legal tradition interpreted the statute to mean that the Jews were to be judged according to their own laws.

The Bambergers' lawyer also focused on technicalities. He noted that the document that Kann submitted to the court was obviously not signed by the Bambergers and therefore could not be used to validate Kann's claims against them. This was true. Kann brought a copy of what the Bambergers had agreed to that was signed by the notaries of the Jewish community, but not the original document that had been drawn up between Kann and the Bambergers. The copy attested to the Bambergers' acquiescence to the agreement, but it was not signed. Moreover, the Bambergers claimed that the *Judenbeglaubten* did not have the legal authority to act as notaries to confirm the contents of the original contract.[189]

The lengthy delays in the progression of the case had serious consequences for Kann. His lawyer, Seyfried, died in March 1781 and this forced him to find a new counsel.[190] More significantly for Kann, sometime between February and October 1783, he suffered what appears

186 "RHR, Denegata Recentiora, K390-1," bundle 9, no folio.
187 "RHR, Denegata Recentiora, K390-1," bundle 17, no folio.
188 See Frier, *The Codex of Justinian*, 1.9.8, and the discussion above.
189 "RHR, Denegata Recentiora, K390-1," bundle 17, no folio.
190 Dölemeyer, *Frankfurter Juristen*, 191, no. 612.

to have been a stroke that left him unable to sign his name or leave his bed.[191] This was not Kann's first illness. He had been sick earlier, and, after his apparent stroke, his wife Hawele took over running his affairs and continued to do so until her own death in April 1784.[192] At this point, it not only had to be decided who would take over the business but who would be the plaintiff in the case. In a letter to Kann's agent at the RHR, the Frankfurt lawyer, Johann Büchner, who had written his dissertation on bills of exchange, explained that more time was required to settle these administrative matters and to continue to collect more sources of Jewish law to support the plaintiff's claims.[193]

It appears that the Kann family was unable to settle these questions amicably or through the rabbinic court. Sometime before 2 December 1784, the authorities in Frankfurt declared Kann legally incompetent and his assets were put under the guardianship of his son, Isaac, and a state-appointed guardian, a newly minted lawyer named Johann Georg Grambs. Grambs was a particularly good choice in the context of Kann's appeal to the RHR, as he had written his doctoral dissertation on the relationship between the City of Frankfurt am Main and the two Supreme Courts of the Empire.[194] Grambs wrote to the RHR agent in Vienna to introduce himself as the state-appointed guardian of Kann's affairs. He reported that he had tried to reach a compromise with Bamberger to no avail.[195] Grambs characterized the case as a particularly difficult one and said that he would need "rare books" to research it further.[196] Those "rare books" included material about Jewish law.

Annex A

In general, legal professionals in Frankfurt accessed the sources that they needed to prepare their cases either in their own libraries or in the city library. However, Kann had wanted to argue this case based on Jewish law. By 1780 there were several Latin, German, and French sources that could be used for understanding Jewish law, including partial translations of codes of Jewish laws and customs and ethnographies that included much information about Jewish practice. None of these works, however, addressed the intricacies that riddled the

191 The "Frankfurt Memorbuch," fol. 297v, p. 593, noted that Kann suffered difficult physical afflictions during the last years of his life.

192 Ettlinger, "Ēlē tōldōt," 2.IV.1784. Regarding Hawele's taking over the running of the business, see "RHR, Denegata Recentiora, K390-1," bundle 23, annex O.

193 Regarding Johann Büchner, see Dölemeyer, *Frankfurter Juristen*, 25, no. 83. He should not be confused with Johann Gottfried Siegmund Albert Büchner (no. 84), who by this time was a member of the law faculty in Giessen (Kischkel, *Die Spruchtätigkeit*, 509–510). Büchner's dissertation, *De illis*, 29–30, briefly dealt with a woman's obligation regarding her husband's bill of exchange.

194 Dölemeyer, *Frankfurter Juristen*, 311, no. 528.

195 Kann's son reported that Bamberger had told people in the Judengasse that he would pursue the case "forever" ("RHR, Denegata Recentiora, K390-1," bundle 20, annex O, no folio).

196 "RHR, Denegata Recentiora, K390-1," bundle 25, annex O, no folio.

Kann-Bamberger dispute.[197] The legal professionals in this case were very much dependent on their clients for information.

Notably, it was not enough for Kann's legal team and the Bambergers to explain the details of Jewish law to their respective counsels and have them present their arguments in court. In the eighteenth century, all petitions to the RHR were submitted in writing.[198] There were no oral arguments. Pleadings had to be formulated, written down, and sent to Vienna with the necessary evidentiary documentation. Since Kann wanted the case to be judged in accordance with Jewish law, he and his legal team had to gather the Hebrew sources that they thought were pertinent to the case, translate them into German, and present them to the court.[199] They did so in annexes that were appended to the files, the lengthiest and most ornate of which was labeled Annex A.

Annex A presented the court with twenty-three sources of Jewish law in the Hebrew original and in German translation. As in modern courts, Kann had to provide the Bambergers with a copy of the annex so that they could challenge the translations, if not the sources themselves. Only the copy of the annex deposited with the RHR is known to have survived.

A letter from Leb's son, Isaac Löw Beer Kann (d. 1811), to his agent at the RHR in Vienna – in which Isaac asked him to return a pocketknife that he had left in the file by mistake – said that he and his sons had prepared the Hebrew sources for the case "with much effort and patience."[200] Isaac was a businessman, not a professional scholar. Nevertheless his entry in the Frankfurt *Memorbuch*, a listing of members of the Jewish community who died and either left a charitable donation to the community so that their names and a brief description of their lives would be written in this communal book or their surviving family members did so for them, labeled him *ha-torani* ("the learned"), affirming that he achieved a noteworthy level of rabbinic scholarship during his lifetime.[201] The inscription on the gravestone of Isaac's son, Ber Kann (1762–1816), said that he set times to study Torah, but he was not

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197 See, for example, Maimonides, *Hebraeorum de connubiis jus civile*; Caro and Iserles, *Senteniae rabbinorum*; Mendelssohn and Lewin, *Ritualgesetze der Juden*; Beck, *de juribus Judaeorum*. English and Dutch scholars translated some classic rabbinic sources, such as the Mishnah, for they were interested in understanding early Christianity. See Ruderman, *Connecting the Covenants*, Appendix 2 with n. 27. There were tens of early modern ethnographical works on the Jews in different languages. For a survey, see Deutsch, *Judaism in Christian Eyes*, 34–76.

198 See Oestmann, "The Law of the Holy Roman Empire," 753.

199 In 1781, the regional council (*Regimentsrat*) and judge (*Landrichter*) of Upper and Lower Swabia sent a dispute between the Jewish community of Illereichen-Altenstadt and its cantor and religious leader to the authorities in Frankfurt. The intra-Jewish case had been brought to the rabbi of Wallerstein, but his decision was appealed to the non-Jewish authorities. The record indicates that material was presented in both Hebrew and German "writing," suggesting that it included translations. See Fram, *A Window on Their World*, no. 139.

200 Regarding the request for the return of the *sackmeßer*, see "RHR, Denegata Recentiora, K390-1," bundle 32, annex D, no pagination.

201 "Frankfurt *Memorbuch*," fol. 435v, p. 869. The entry notes that Isaac himself prohibited any praise of him in the *Memorbuch*. Also see Ettlinger, "Ēlē tōldōt," 6.IX.1811. On *Memorbuch*, see Kaplan, *The Patrons and Their Poor*, 134–155, and regarding Frankfurt in particular, 146–154.

labelled a scholar.[202] Another of Isaac's sons, Hayyim Kann (d. 1845), was said to have studied "the holy books" in his free time and led prayers on the High Holidays in one of the Frankfurt synagogues. Perhaps he was a budding talmudic scholar before entering the business world, but he was born in 1768 and, at about the age of seventeen in 1785, he may have been too young to help in searching for sources in a complicated area of Jewish law.[203] Still, Isaac's sons probably studied in a yeshiva in their youth, where they would have met others who could assist them in their searches.[204] Ultimately, Annex A was a combined effort in which members of the Kann family prepared the materials, with or without the help of others. There are indications in the sources presented to the RHR that those who participated in the process were not scholars of the highest rank.

As noted earlier, by the eighteenth century, Rabbi Joseph Caro's *Shulḥan `aruk* was the authoritative code of Jewish law. When Caro's work was first published in Venice in 1564–1565, it was a rather slim volume, but it soon was glossed by Rabbi Moses Isserles of Cracow (d. 1572), who added the customs of Polish, if not German Jewry to Caro's work. Working contemporaneously but separately, the two scholars succeeded in creating a legal code that could be used by world Jewry.[205] During the seventeenth and eighteenth centuries, *Shulḥan `aruk* garnered commentaries and super-commentaries that were published in the margins of the text. This made printed volumes of *Shulḥan `aruk* the most up-to-date legal reference work in the Jewish world and the focus of practical legal discussions. It also made the *Shulḥan `aruk* corpus of the mid-eighteenth century a large and difficult legal source.

When citing *Shulḥan `aruk*, the Hebrew scribe who prepared Annex A faithfully copied the printed text, so much so that he reproduced not only Caro's words, but also the reference numbers to glosses on Caro's code that the Kann legal team thought relevant.[206] For example, in section five of the annex, the scribe transcribed a segment of *Shulḥan `aruk*, "[…] even though the date of payment has passed, the guarantee 19 still applies."[207] The number 19 was not part of Caro's original text but a reference note to a gloss that appeared in the margins of *Shulḥan `aruk* as printed in the eighteenth century. According to Annex A, the number referred the reader to the comments of Rabbi Shabbetay ben Me'ir ha-Kohen (d. 1662), one

202 Horovitz, *Sefer abney zikkaron*, no. 4850.

203 See "Frankfurt *Memorbuch*," fol. 524v, pp. 1047, 28 Elul 5605 (30 September 1845).

204 Two of Isaac Kann's other sons, Abraham and Simon, were both born in the mid-1770s and would have been too young to participate in the search. See their entries in the Frankfurt *Memorbuch*; Abraham ("Frankfurt *Memorbuch*," fol. 483v, pp. 965, 4 Elul 5590 [23 August 1830]) and Simon ("Frankfurt Memorbuch," fol. 520r, pp. 1038, 1 Sivan 5603 [30 May 1843]).

205 On Caro and Isserles as integral components of *Shulḥan `aruk*, see Twersky, "The Shulḥan 'Arukh," and Fram, "*The Codification of Jewish Law*," pp. 1–20.

206 In some instances, Isserles's comments were set off at the end of a section of translation and labeled "*Anmerkung*" or "*Obs[ervationes]*" ("RHR, Denegata Recentiora, K390-1," Annex A, §§ 4 and 22). This was misleading. A German reader might have perceived of the "observations" as the translator's legal ruminations, similar to those that appeared in §§ 7 and 22, rather than as binding legal dicta.

207 "RHR, Denegata Recentiora, K390-1," Annex A, § 5.

of the most important commentators on the code. Intriguingly, however, there was no gloss number 19 in this section of Shabbetay ben Me'ir ha-Kohen's commentary on *Shulḥan `aruk*.

In 1749 Rabbi Moses ben Simeon Frankfurter (d. 1762), a rabbinic court judge in Amsterdam, printed the civil law section of *Shulḥan `aruk* (Ḥoshen misphaṭ) together with a selection of commentaries that he often abridged and summaries of rabbinic responsa connected to this part of the code. The relatively compact volume was reprinted in Amsterdam in 1764 and in 1785.[208] Reference number 19 in section five of Annex A corresponds exactly to Frankfurter's reference number 19 in his edition of *Shulḥan `aruk* and includes a word-for-word copy of Frankfurter's abridgement of the words of Shabbetay ben Me'ir ha-Kohen. Kann's legal team apparently relied on Frankfurter's abbreviated edition of monetary law rather than on the complete and lengthy commentaries on *Shulḥan `aruk* as their source. This is something that a leading scholar of Jewish law was unlikely to have done.[209]

Furthermore, a mistake that crept into the annex suggests that a draft copy of the material was prepared in advance of the final copy. Between sections 5 and 6 there is a reference to a subsection of *Shulḥan `aruk*. The entry was not numbered and was not copied out in full and translated like the other material in the annex.[210] The source referred to notes that both a man and a woman have the right to make conditions prior to marriage. A woman may prevent her husband from accessing four things – the fruits of her labors, items that she finds, profits from lands that she owns, and inheritance – that he would normally have rights to.[211] This would seem to have been of little use to Kann and might even have been used to protect Fradche Bamberger's assets had it been possible to prove that Fradche had made such a condition at the time of her marriage. The citation was likely raised as a possibility by Kann's research team, written in a draft copy of the annex, and ultimately rejected. Perhaps there was other material as well that was suggested, considered, but upon closer inspection deemed inappropriate. Presumably, the stray reference between sections 5 and 6 made its way

[208] Two such compilations with the same title, *Be'er heyṭeb* on Ḥoshen misphaṭ, appeared in Amsterdam before 1785. Frankfurter's work was printed and reprinted at the press of Johanan Levi Rofe, his brother-in-law Baruch, and his brother, Hirz. The other volume was prepared by Zechariah Mendel of Belz and published at the Proops press (also in 1764). As Weller, "Mahadurot be'er heyṭeb," 843–846, points out, the latter work became part of modern editions of *Shulḥan `aruk*.

[209] Similarly, see "RHR, Denegata Recentiora, K390-1," Annex A, § 21. There too, Kann's legal team relied on an edition of *Shulḥan `aruk* that included abbreviations of commentaries as well as additional material culled from the responsa literature. In this section of Annex A too, the scribe copied the scholarly reference notes into the run of text just as they were printed in the Amsterdam edition of *Shulḥan `aruk*, Eben ha-`ezer (1739 or subsequent editions; the work was printed twice in Amsterdam in 1753 by different printers, and, again, in 1773 [see Weller, "Mahadurot be'er heyṭeb," 842–843]). The scribe then copied the contents of the notes, including a mistaken reference to a passage in B.T., *Giṭṭin* 55a, at the end of the citation. This edition of *Shulḥan `aruk* may have been especially well received in Frankfurt for it was prepared by Rabbi Judah Ashkenazi. Ashkenazi, who served as a rabbinic judge in Tykocin (Poland; see Nadav, *Pinqas qahal Ṭiqṭin*, 1:nos. 88, 90), was the son of Rabbi Simon (d. 1730; Ettlinger, "Ēlē tōldōt," 15.IV.1530) who had been the scribe and notary of the Jewish community of Frankfurt.

[210] The reference in the annex reads "Eben ha-`ezer 69.6; tractate *Ketubbot* 56a, Rabbi Judah says, etc."

[211] *Shulḥan `aruk*, Eben ha-`ezer 69.3–4.

into the annex due to an oversight, but it is unlikely that a talmudic scholar would have ever considered jotting this text down for inclusion.

The sources in Annex A were carefully ordered. The very first Hebrew text cited made it clear that Jewish law demanded joint liability if a husband and wife took out a loan together. "If a husband and a wife take a loan from someone, she must pay half of the debt from her marriage contract for, regarding the debt, it is as if she borrowed it herself." This was the cornerstone of Kann's claims against the Bambergers. The second source stated that if a woman admitted that she shared a financial obligation with her husband, Jewish law demanded that she pay the debt and did not allow her to claim that she had entered the agreement simply to placate her husband.[212] The third source emphasized the joint obligation of both debtors to pay the entire outstanding loan. Each of the twenty-three sources cited was intended to make it increasingly clear to the court that Jewish law held Lemele and Fradche Bamberger jointly liable for their debts to Kann.

As is often the case in adversarial disputes, Kann's legal team cited its sources selectively and, sometimes, questionably. It quoted a section of *Shulḥan `aruk* that ruled that if "the creditor stipulated with the debtor that he [the creditor] will always be believed to say that he has not been paid, he [the creditor] can collect [from the debtor] without any oath, even though the creditor claims to have repaid [the debt]. And this is true even if the loan was contracted orally." Kann did not mention Isserles's gloss on this ruling that stipulated that this was only true if the debtor accepted these conditions before witnesses.[213] Kann's legal team provided the court with the legal sources that it believed would lead the court to the desired conclusions.[214]

Once the sources had been selected and ordered, they were given to a professional scribe with a high level of Hebrew calligraphic skills to create Annex A. The scribe carefully wrote out the Hebrew text in block letters on the right side of the page. The legal code cited was identified (e.g., *Shulḥan `aruk*) in a colored ink that appears to have been a mix of green and black. The specific chapter was noted, often in green ink, the paragraph, often in red, and then the law was written out in black letters. The underlying sources of the law, such as the Talmud or medieval decisors, were added in colored ink. The Hebrew texts were framed within two lines, one red, the other green. (Figure 2)

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[212] Such an argument was admitted with respect to a husband's sale of assets on which there was a lien from his wife's marriage contract. The fear was that if she objected to the sale, her husband might suspect her of being interested in a divorce or his death. The rabbis allowed her to adjust her claim later and, if she stated that she only agreed to the sale to make her husband happy, she is to be believed. See Weil, *Responsa*, vol. 1, no. 19, pp. 19–20.

[213] *Shulḥan `aruk*, Ḥoshen mishpaṭ 71.1, with "RHR, Denegata Recentiora, K390-1," Annex A, § 4.

[214] See Oestmann, *Rechtsvielfalt vor Gericht*, 99–106, regarding the *Reichskammergericht*. With respect to the RHR, see Kasper-Marienberg, *Vor Euer Kayserlichen Mayestät Justiz-Thron*, 149–156.

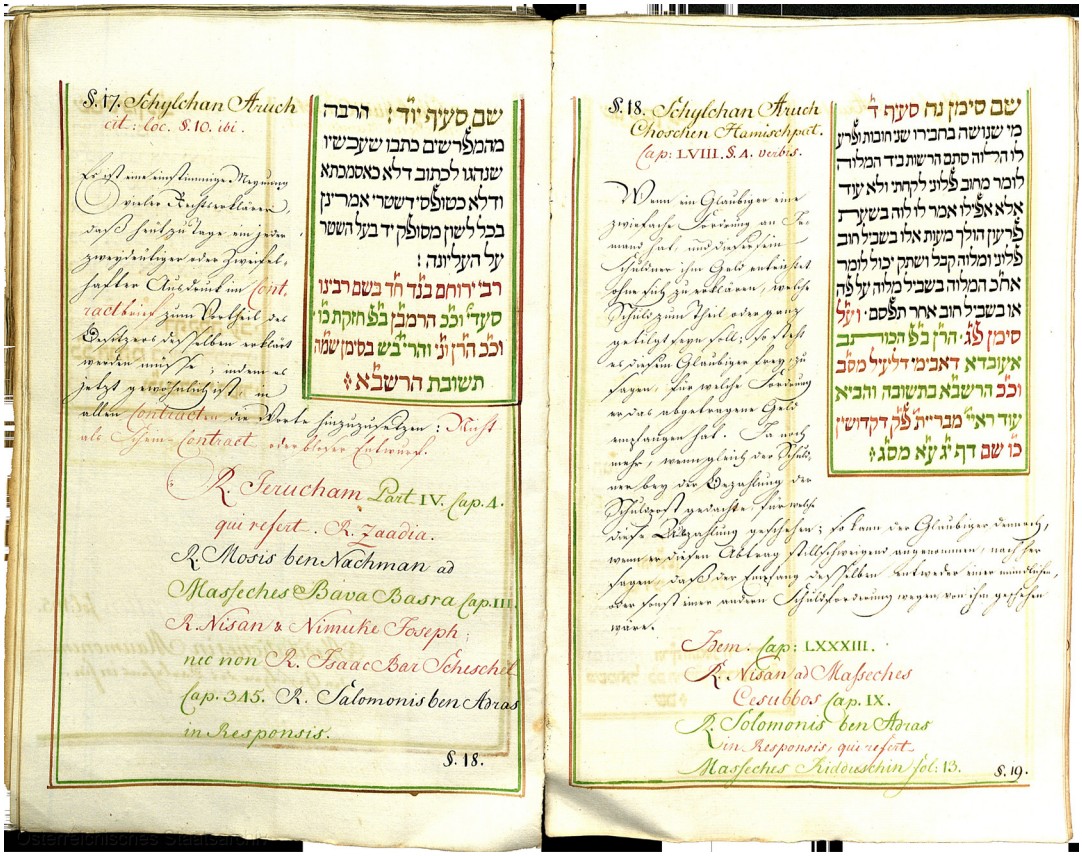

Figure 2: Excerpt from Annex A. Austrian State Archive. ÖStA, HHStA, RHR Denegata recentiora, K390, Fasc. 34, Lit. A, no folio number.

Kann's legal team knew that there was little chance that any member of the RHR would have been able to read the Hebrew words, let alone understand them, and they made no effort to make it easier for them to do so. There were no vowels placed under the block Hebrew letters, there was no punctuation, and Hebrew abbreviations were not expanded to help non-specialists understand them. The sources were the basis for the real point of the annex: the German translation.

After writing each Hebrew section of the annex, the scribe passed the page on to a German scribe to enter the translation, the character of which will soon be discussed. Each German entry was set apart using the section symbol (§) and numbered consecutively. Like the Hebrew scribe, the German scribe used different colored inks, but not always in the same fashion that the Hebrew scribe did. Sometimes red ink was used to highlight what the translator believed to be important terms.[215] Red was also used to introduce annotations that the translator

[215] See, for example, § 13 where three separate words appeared in red in "comment 1" in the German translation. In this instance, it is not clear how this helped the reader.

offered the jurists of the RHR.[216] As in the Hebrew, names of the Jewish authorities cited were written in colored ink.

A bibliographic reference was given at the beginning of the section and the sources that the codes relied on were provided at the end of the citations, transliterated using Latin characters and presented in large, colorful, and beautifully written letters.[217] The cumulative effect was that the reader, particularly the German reader who was not familiar with the material, was given the impression that numerous sources supported Kann's case.

The accompanying legal briefs explained to the RHR that "the sources that were chosen for reference are Choschen Hammischpat, Jore Deah, and Even Haeser. These three books of law are the true and only ones according to which the topics of what is mine and yours, as well as the permitted and the forbidden, are decided among all Jews in the Empire."[218] Ḥoshen mishpaṭ, Yoreh de`ah, and Eben ha-`ezer were not codes of Jewish law or stand-alone books but the titles of sections of Rabbi Jacob ben Asher's *Arba`ah ṭurim* and Joseph Caro's *Shulḥan `aruk*. These codes were divided into four sections. One dealt with reccurring rituals such as daily prayer, the Sabbath, and festivals (Oraḥ ḥayyim). The other three sections were those referred to here.

It was Jacob ben Asher who had first introduced these divisions of Jewish law in his fourteenth-century code, *Arba`ah ṭurim*. The point is significant because Annex A cited both Jacob ben Asher's code and Caro's *Shulḥan `aruk* and its accompanying commentaries.[219] By being somewhat ambiguous, Kann's legal team was able to vouch for the authority of the two central books quoted without delving into specifics.

The production of Annex A was a cooperative effort of a research team composed of members of Kann's family, perhaps working with other scholars of Jewish law, a professional Hebrew scribe, a translator, and a German scribe skilled in chancellery script (*Kanzleischrift*).[220]

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216 See, for example, "RHR, Denegata Recentiora, K390-1," bundle 34, Annex A, § 3.

217 Sometimes the German translation provided incomplete references. See, for example, "RHR, Denegata Recentiora, K390-1," Annex A, §§ 2 and 10.

218 "RHR, Denegata Recentiora, K390-1," bundle 34, 4.

219 "RHR, Denegata Recentiora, K390-1," Annex A, §§1 and 10. Although § 21 was specifically labeled as being taken from Jacob ben Asher's *Arba`ah ṭurim*, it was a citation from Caro's *Shulḥan `aruk*. Kann's legal team's reliance on Jacob ben Asher's code in §1 of Annex A is noteworthy. Caro copied most of Jacob ben Asher's ruling verbatim in *Shulḥan `aruk* (Ḥoshen mishpaṭ 77.10) and Kann could have cited from Caro's work. However, Jacob ben Asher's formulation was significant: "A husband and wife who jointly take a loan. She is obligated to pay half of the loan from her marriage contract, *for she is regarded as having taken half the loan by herself*" (italics added). Caro deleted the italicized words, the very words which emphasized Fradche Bamberger's liability. Kann's legal team recognized their importance for forwarding Kann's claims and therefore cited Jacob ben Asher's ruling, not Caro's.

220 There is no evidence that a Jewish scribe knew how to write *Kanzleischrift*. The only person who might have been capable of writing both the Hebrew block text and a German chancellery script, was Hartwig (see the following section on this person). However, several letters, including "r" and "g" used in the German are distinctive and do not correspond to Hartwig's formation of these letters in his attestation to the accuracy of the material at the end of the annex. Moreover, a comparison of the script in a letter written by Hartwig on 11 March 1800 and the translation in Annex A shows that he was not the scribe of the German translation. See "RHR, Obere Registratur, K 278.5," bundle 38, no folio.

Together they produced an informative and esthetically pleasing legal document. No wonder that Kann's legal team boasted that "in a century there had not been such a presentation to the highest office" and hoped that it would be as well received in Vienna as it was in Frankfurt.[221] Yet if Annex A was to be well received, a simple translation with just a few tweaks would not do. The translation of the Hebrew sources was a crucial phase in the presentation of the Kann case because the RHR was expected to decide the case based on Jewish law, but it was not expected to know Jewish law. The RHR was wholly dependent on the translation, and the success of Kann's appeal hinged on an effective presentation of the Jewish legal sources to the German- and Latin-reading jurists.

The Convert and Lawyer

Generally, Jewish notaries were accredited to translate legal documents from Hebrew into German on behalf of the community.[222] However, while the case was still being contested in Frankfurt, Kann and his lawyer hired the convert Franz Christoph Bacher to translate the contract between Kann and the Bambergers, the bills of exchange that the Bambergers had given Kann, and the protestation of the bills. Bacher then certified that his translations were word for word translations (*von Wort zu Wort gleichlautend*).[223] These translations were probably of a rather standard nature since the documents in question were common among Jewish merchants and did not require much knowledge of Jewish law. Now that the case was moving on to Vienna and Kann had to provide sources from Jewish law to support his claims and arguments, a more learned translator would be required.[224] Despite a philological tradition of literal translations in German-speaking lands, such a presentation of Jewish

221 "RHR, Denegata Recentiora, K390-1," bundle 32, annex O, no pagination. It is unclear who was being referred to as having received this material in Frankfurt – the legal professionals or members of the Jewish community.

222 See "Expert Opinion of Rabbi Pinhas Horovitz," no folio, where the translation was signed by two Jews who were labeled as "*Beglaubten*," a literal translation of the Hebrew term *ne'emanim*, but in German indicating some form of accreditation (see Grimm and Grimm, *Deutsches Wörterbuch*, s.v. "beglaubigen"). Evidence of this special standing is found in other contemporary Jewish communities, including Bamberg, Berlin, Floß, and Tobitschau (Moravia). Lochner, *Selecta Juris*, 483–487; Grözinger, *Die Stiftungen der preussisch-jüdischen Hofjuweliersfamilie Ephraim und ihre Spuren in der Gegenwart*, 181; Höpfinger, *Die Judengemeinde von Floss*, 201; Flesch, "Aus dem Pinax von Tobitschau," 261, 270. The term continued to be used in the nineteenth century in Amsterdam where one M. Loonstein, who had studied law, was said to be the "Pfründer des Beth Hamidrasch und Beglaubigter der Gemeinde" ("Der Israelit," 10).

223 "RHR, Denegata Recentiora, K390-1," first instance files, fols. 5r–23v.

224 The RHR appears to have had few, if any, rules on the types of legal sources that litigants could submit to the court. This level of accommodation may well have made the RHR the preferred site for Kann and, perhaps, other Jews (see Kasper-Marienberg, *Vor Euer Kayserlichen Mayestät Justiz-Thron*, 149–156). By contrast, the RKG in Wetzlar was less flexible in terms of legal procedure and rules regarding depositing legal sources with the court (see Oestmann, *Rechtsvielfalt vor Gericht*, 156–159). However, in practice, even the RKG was sometimes pliable (91–101).

legal texts would hardly have sufficed.[225] While some rules of Jewish law would have been perfectly clear to any jurist, terms such as *miggo* (lit., "since"), required explanation because the legal semantics of the term went far beyond the simple meaning of the word.[226] Even a paraphrastic translation that sought to provide the German reader with a functional equivalent of the Hebrew sources would have lacked the details that a legal text demanded.[227] A useful translation demanded not only advanced linguistic skills, but a solid knowledge of Jewish legal traditions, intertextual references, and familiarity with German law. For this task, Kann's lawyer hired a young Frankfurt jurist-in-training named Friedrich Christian Hartwig.

Hartwig was not a random choice. He had come to Frankfurt just a few years earlier, but back then he was known as Samuel Hirsch. Like Bacher, he too was a convert. According to the conversion sermon published by Gabriel Christoph Benjamin Mosche (1723–1791), the Lutheran pastor who converted him, Samuel was a native of Groß-Glogau (Lower Silesia; today Głogów in western Poland).[228] Mosche wrote that Samuel, born in 1759, had spent "most of his life in Berlin" and that he and a second young man, Jacob Löwe, came to Frankfurt around Easter (April) 1781 specifically to convert.[229] They studied with a local Lutheran preacher for about three months, after which Mosche tested the young men's knowledge of Christian doctrine. They both knew German well before their arrival in Frankfurt, as they brought with them "six folded sheets" (*Bogen*) in German titled "Darkness and Light" (*Finsterniß und Licht*) that explained their reasons for converting.[230] Mosche quoted from their writings, which included material from the Talmud that they said they had studied from "their youngest childhood."[231] Mosche proclaimed that they answered all his questions

225 Stockhorst, "Introduction," 11, termed it "a philological ethic of accuracy." Still, Stockhorst notes that, in practice, modifications in translations "were the real order of the day" (13).

226 Zevin et al., *Enẓiqlopediyyah talmudit,* vols. 38–39, lists seven entries, spanning more than 50 pages, connected to the term *miggo*.

227 On paraphrastic translations, see Stockhorst, "Introduction," 10.

228 Ettlinger, "Ēlē tōldōt," Judentaufen, 18.VII.1781 and 15.XII.1824. There was a Jewish family from Groß-Glogau in Frankfurt (see Dietz, *Stammbuch*, 108, no. 195). Whether Hirsch was related to them or to anyone else in Frankfurt is not known.

229 Lowenstein, *The Berlin Jewish Community*, 122–124, noted that members of prominent Jewish families in Berlin often left the city to convert to hide their choice from their families and/or prevent a public scandal. An announcement of the double conversion said that they were both students. See "Augsburgische Ordinari Postzeitung," with Ettlinger, "Ēlē tōldōt," Judentaufen, 18.VII.1781.

230 It is unknown how Hirsch and Löwe acquired their knowledge of German. The *Jüdische Freischule* in Berlin where German was taught, started in 1778 but only opened officially in 1781. The school was aimed at the poor but did have other students. In the early years students studied in *cheder* and attended the *Freischule* only in the afternoon. See Eliav, *Ha-ḥinuk ha-yehudi*, 71–73. Perhaps the young men attended these afternoon sessions. Dr. Uta Lohmann kindly informed us that there is no record of the names of students who attended the school in the early years. Regarding the knowledge of German, or lack thereof, among Jews at this time, see the comments of Hirschel Lewin, who served as rabbi of Great Britain and, later, Berlin, cited and translated into English in Altmann, *Moses Mendelssohn*, 379–380.

231 In the pre-Enlightenment age, many male Jewish converts claimed to be learned but were not (see Carlebach, *Divided Souls*, 95–98). Hirsch's work for Kann suggests that he was.

to his satisfaction, and with visible emotion.[232] He added that the two young men did not request any financial support, thus emphasizing to his readers the young men's altruistic reasons for becoming Lutherans.[233] They were baptized on 18 July 1781 at the Barfüßerkirche, less than a ten-minute walk from the Frankfurt Judengasse.[234]

The accuracy of Mosche's description of the young men's motivations cannot be determined. However, according to Steven Lowenstein "the evidence suggests that religious conviction was not one of the most common reasons for conversion between 1780 and 1830" in Berlin.[235] Both of the young men took the personal names Friedrich and Christian. The latter name, according to Lowenstein, was a common choice for a proselyte, but the former was a name of acculturation.[236] As for the surname Hartwig, it may well have harkened back to the name Hirsch.[237] What we do know is that Samuel Hirsch the Jew could not have attended law school in the Holy Roman Empire.[238] Friedrich Christian Hartwig the Lutheran began his legal studies about a month after his conversion.[239] This suggests that Hirsch's conversion, like those of most other young Jewish men from Berlin in this period, was motivated by a desire to secure his economic future rather than by doctrinal beliefs.[240]

Like many students from Frankfurt, Hartwig attended law school at the nearby University of Giessen.[241] In Giessen, Hartwig would have encountered Christian Hartmann Samuel Gatzert (1739–1807) who taught in the law faculty and wrote his dissertation on the status of Jews in German law in the Hesse-Darmstadt territories.[242] While the new convert may not have had much interest in dealing with laws concerning his former co-religionists, a professor who had completed his dissertation on the status of Jews just ten years earlier may

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232 Mosche had an interest in Judaism and some knowledge of Hebrew. His thesis focused on the significance of the age of 60 in the Jewish tradition. See Mosche, *Commentatio*. For reverential biographic and bibliographic information on Mosche, see Mosche, *Gabr. Christ. Benj. Mosche*.

233 Mosche, *Jesus als Preis*, 12, 34–37.

234 Mosche, 40. The church was demolished in 1786–1787. Today the Paulskirche stands on the site.

235 Lowenstein, *The Berlin Jewish Community*, 168–170. Their motives for conversion generally differed from those of medieval Jews, many of whom were motivated by desperation. See Carlebach, *Divided Souls*, 30–31.

236 Lowenstein, *The Berlin Jewish Community*, 125.

237 Naphtali Hirz (=Ger., Yid., Hirsch) Wessely was called, in German, Hartwig Wessely.

238 In the 1780s, Jews were still barred from arguing cases (see The Sirmondian Constitutions in Pharr, Davidson, and Pharr, *Theodosian Code*, no. 6) and were not admitted to legal studies at German universities.

239 Conversion at a young age seems to have been the pattern in Frankfurt, at least in the 1720s. See the converts listed in Belli, *Leben in Frankfurt am Main*, 4:47, 49, 59, 78. All were in their teens or very early twenties when they converted. This was true in late eighteenth century Berlin as well. See Lowenstein, *The Berlin Jewish Community*, 122.

240 See Lowenstein, *The Berlin Jewish Community*, 165, 174–175.

241 Like most imperial cities in the empire in the eighteenth century (e.g., Nürnberg, Hamburg, Regensburg), Frankfurt did not have its own university. On Frankfurters studying law in nearby Giessen, see Dölemeyer, *Frankfurter Juristen*, liv–lviii.

242 Gatzert, *Tractatus iuris germanici de Iudaeorum*.

have had great interest in a former yeshiva student.[243] This may help explain how a young man like Hartwig, who probably had little or no formal education in Latin, was able to begin his studies so quickly at Giessen.[244] Hartwig graduated from the law faculty in 1787 with a dissertation of just 24 pages written in German. His fellow students all wrote longer dissertations in Latin.[245] Clearly, some allowances were made for the neophyte.[246]

Hartwig became an *advocat* in Frankfurt on 24 September 1787 and had dealings with Frankfurt Jews, representing both individuals and the community before the Frankfurt municipal court.[247] Eventually, Hartwig prepared cases on behalf of the Jewish communal leadership that were sent to the RHR.[248] While there were no Jewish lawyers in Frankfurt until 1812, Jews could have sought legal counsel from other lawyers who were not converts.[249] That Frankfurt Jews were not averse to turning to a convert for legal assistance was a significant change from the hostile attitude that Jews in the German lands were known to have had

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243 Hartwig may have maintained an interest in the status of the Jews even after his conversion. According to Kracauer, *Geschichte der Juden in Frankfurt*, 2:527, Hartwig published a book entitled *Über die bürgerlichen Verhältnisse der Juden in der kaiserlichen freien Reichsstadt Frankfurt* in 1805. We have been unable to locate such a volume.

244 Hartwig's acceptance at the law school weeks after his conversion raises question about his preparedness. The *Jüdische Freischule* in Berlin did not teach Latin (Eliav, *Ha-ḥinuk ha-yehudi*, 72). In the seventeenth century, most Frankfurt lawyers had studied in the Frankfurt am Main Gymnasium, but by the end of the eighteenth century the number of law students declined and students who had studied with private teachers or in schools outside of Frankfurt were accepted into law school. See Dölemeyer, *Frankfurter Juristen*, il–li. As a recent convert, Hartwig may have benefited from the loosening of standards.

245 Hartwig, *Kurze Beleuchtung eines Peinlichen Rechtsfalles welcher, authentischen Nachrichten zufolge, im Jahre 1781 sich zugetragen hatte*. Also see Schüling, *Die Dissertationen*, 1976, 250.

246 Hartwig's dissertation dealt with an anonymized case of denied justice, documenting the rights of a suspect accused of a criminal act in court. The title page of the dissertation had a quote from a noteworthy contemporary journalist, Wilhelm Ludwig Wekhrlin (1739–1792). Wekhrlin promoted enlightenment ideas of freedom of opinion, tolerance, and social justice but his writings were repeatedly censored. Wekhrlin also engaged in political commentary regarding local and imperial authorities, for which he was arrested and imprisoned in May of the very same year in which Hartwig published his dissertation. Hartwig was exposed to these activities and the epigraph suggests that his dissertation was, at least in part, a statement of support for Wekhrlin and his ideals. On Wekhrlin, see Böhm, *Ludwig Wekhrlin*, and, more recently, Mondot, *Wilhelm Ludwig Wekhrlin*. Wekhrlin advocated improving the status of contemporary Jews (see Mondot, 536–542). It is unknown whether this influenced Hartwig's attitude towards him.

247 On Hartwig as a lawyer in Frankfurt, see Dölemeyer, *Frankfurter Juristen*, no. 249, pp. 74–75. Regarding his representation of Jews, see *Neues genealogisches 1789*, Frankfurt am Main, 4, and "Intelligenz-Blatt, 21 November 1788."

248 See Kasper-Marienberg, *Vor Euer Kayserlichen Mayestät Justiz-Thron*, 459–464, 474–480, and Gotzmann, *Jüdische Autonomie*, 461 n. 132. A personal letter from Hartwig to a Viennese lawyer from 11 March 1800, bound in a request for a deadline prolongation, indicates that Hartwig was involved in, or at least aware of, other proceedings of the Frankfurt Jewish community at the RHR. "RHR, Obere Registratur, K 278.5," bundle 38, no folio.

249 Frankfurt Jews began to attend faculties of law in 1808. See Richarz, *Die Eintritt der Juden*, 186. Carl Leopold Goldschmidt studied in Heidelberg and entered practice on 16 March 1812 (*Staats-Kalender der Freien Stadt Frankfurt am Main*, 27). He ultimately became a leader of Frankfurt's liberal Jewish community and wrote on several legal topics, including bills of exchange. See Goldschmidt, *Bemerkungen*.

in earlier centuries towards those who converted out of choice rather than under duress.[250] No less significant, Hartwig was willing to work with and for his former coreligionists.

In 1785, Hartwig had yet to complete his legal training. However, Johann Georg Grambs, the state appointed guardian of Kann's affairs, had studied at the University of Giessen, and although he left Giessen before Hartwig arrived there, networking possibilities existed between the law school and graduates of the program who were practitioners in Frankfurt.[251] There were only four or five full professors on the law faculty at any given time, and fifteen lawyers who completed their dissertations in Giessen went on to work in Frankfurt between 1775 and 1784.[252]

In a letter to the court dated 30 June 1785, in which Grambs sought to establish Hartwig's credentials as an expert translator, Grambs said that it was Kann who had asked Hartwig to join his legal team. Grambs wrote glowingly of Hartwig's abilities.

> The translator of Annex A, Mr. F. Ch. Hartwig, whose taintless name, proven integrity, and eagerness for knowledge are well-known in Frankfurt, as well as [in] his previous place of residence. He first undertook serious study of the talmudists before he devoted himself to civil legal scholarship. He just recently left the University of Giessen with all the required knowledge and took up residence in Frankfurt am Main. He was pained at the thought that such a justified case could be distorted by sophistry and to see that the just side is in danger of losing, while the one without any conscience might triumph. At the request of this lawyer's client, he took on himself the great effort to research all those Jewish laws relevant to this particular case that are in Annex A, to study them with great attention, and to translate them correctly and comprehensibly into the German language. Furthermore, he translated all documents from one language into the other with particular concern for the actual meaning in the original language and the most appropriate terms in German. Due to a lack of thorough knowledge of German and talmudic language, of which the first is obvious and the second would have required the study of Jewish scholarship, the previous translations of the documents [perhaps the contracts and bills of exchange submitted to the municipal courts that were translated by Bacher – Authors' note] were partly negligent, partly just totally incorrect. Therefore, they are useless for the purpose for which translations of important contracts are required. It is left to Your Imperial Majesty's most merciful decision as to whether to have these translations with the attached originals reexamined by a designated judge who is knowledgeable in both languages or to put the aforesaid Hartwig to that end under

[250] Carlebach, *Divided Souls*, 23, discusses the outright hostility towards converts shown by the leader of German Jewry in the sixteenth century, Josel of Rosheim. However, as the early modern period progressed, there were regional differences in attitudes to converts. Economic class also affected opinions. See the discussion in Shashar, *Gebarim ne`elamim*, 220–223.

[251] Hartwig did not try to hide his professional status. He signed his name as "Candidat," since he had not yet become a full-fledged lawyer.

[252] See Schüling, *Die Dissertationen*, 1982, 225–244, and Kischkel, *Die Spruchtätigkeit*, 508–510.

> oath. An inquiry could be made in Frankfurt to ascertain whether he [i.e., Hartwig] is or is not superior to the previous translator in terms of expertise.[253]

Grambs made it clear to the RHR that Hartwig was eminently qualified to translate the material into German. His note that the court had the option to have the translation "reexamined by a designated judge who is knowledgeable in both languages" to see if it was accurate exuded confidence in Hartwig's abilities. Grambs further wrote that Hartwig had studied the laws presented in Annex A to translate and explain them effectively. Friedrich Christian Hartwig may not have been fully at home in German, but as Samuel Hirsch he had been a yeshiva student and could translate, if not contribute to the annex.[254] Hartwig mediated the presentation of the Hebrew material to the RHR though his translations and explanations.

The point of Annex A was to provide the RHR with the sources of Jewish law with which to judge the case and Grambs assured the judges of the RHR that they were receiving the law correctly. Grambs was certain that the compilation contained previously "unheard of" legal material about Jewish contracts that would "enlighten" legal scholarship (*Lehre*).[255] Yet this would all be for naught unless it was effectively presented to the court.

Translation

The translation of Annex A posed significant challenges at the most basic level.[256] Even personal names were problematic. While members of the RHR would have been familiar with the likes of jurists such as Johann Gottlieb Heineccius (1681–1741) and Justus Henning Böhmer (1674–1749), who wrote important and often reprinted treatises on civil law, Rabbi Moses Maimonides (1135–1204, Egypt), author of *Mishneh Torah*, the most important code of Jewish law written in the Middle Ages, would probably have been unknown to them. Moreover, Jewish legal scholars were often referred to by Hebrew acronyms, such as Rashi, or by the titles of their books. This was an easy reference system for the cognoscente but impenetrable to the uninitiated. Of the more than thirty rabbinic authors cited in the annex, almost all were identified by acronyms or the titles of their books. Rabbi Israel Isserlein (d. 1460) was referred to both as *Trumas Haddeschen* (the name of his book) and *Maharai*, an initialism not always clear even to those familiar with rabbinic literature. Rabbi Solomon Luria (d. 1573,

253 "RHR, Denegata Recentiora, K390-1," bundle 34, pp. 104–107. Underling in the original.

254 Hartwig's German showed slight idiosyncrasies with respect to grammar and word choice. For example, instead of "eine Scherbe, die" he would use "ein Scherben, der" or "Handschrifften" instead of "Unterschriften."

255 "RHR, Denegata Recentiora, K390-1," bundle 32, annex D2, no pagination.

256 The need for cultural mediation was not unique to translating legal texts or translating from Hebrew into German. Texts translated into Hebrew faced the same issue. See Idelson-Shein, "Rabbis of the (Scientific) Revolution," 54–81.

Poland) was referred to as "Raeschal" or "Meharschal" and Shabbetai ben Me'ir ha-Kohen was cited by the title of his commentary, "*Siphtey Cohen.*" There was no attempt to explain who these authors were or contextualize them for the members of the RHR. Either the translator's ease with rabbinic literature carried over into his citations of standard rabbinic legal texts or he himself was not familiar with whom each of these authorities was. Perhaps both.[257] This failure to identify the rabbinic authorities is not surprising, because in the discourse of talmudic literature there was rarely a need to place the personalities being discussed in their historical contexts. As in the study of Roman law in Italian schools of the Renaissance, views of legal authorities from different times and places generally converged. When authorities lived was often of little importance to Jewish legal discourse.[258] The uninitiated either had to do independent research or remain perplexed.[259]

Terms that were perfectly clear to learned Jewish readers had to be mediated for non-Jewish readers. To do so, Hartwig sometimes made simple substitutions without ever informing the reader. When a Hebrew text referred to a small coin from talmudic times, a *dinar*, it was translated as the smallest coin of the time in Frankfurt, a *heller*.[260] In other instances, some explanation was necessary. The Hebrew word *ge'onim* referred to the heads of the two leading talmudic academies in Babylonia from approximately the late sixth to early eleventh centuries. It was familiar to almost anyone who studied Jewish law and carried with it an addition-

257 The sources provided in "RHR, Denegata Recentiora, K390-1," Annex A, § 1, are a case in point. The law was cited from Jacob ben Asher's fourteenth-century *Arba`ah ṭurim* (Ḥoshen mishpaṭ 77.11). The underlying sources for the law provided for the German reader were, "Turey Sahav ibique allegatus Raeschal Responsa. Cap. 93; Baal Hatrumos Cap. XLIV que refert. Decis. R. Isaac Alphesi." The reference to Rabbi Baruch ben Isaac's thirteenth-century *Sefer ha-terumah* with the cross-reference to Isaac Alfasi's responsa made perfect sense, as Joseph Caro had already noted that these were the sources for Jacob ben Asher's ruling (see *Beyt Yosef* on this section of *Arba`ah ṭurim*). What made no sense was the reference to David ben Samuel ha-Levi's citation of Solomon Luria's responsum no. 93. Luria wrote in the second half of the sixteenth century and could not have been a source for the fourteenth-century Jacob ben Asher's ruling. Luria – and David ben Samuel ha-Levi – offered some clarification of Baruch ben Isaac's ruling but that was not developed here. Hartwig seems to have misunderstood the abbreviation that was used in the Hebrew reference. The Hebrew directed readers to look at Luria's discussion; the German referred to Luria as a source of the law. Hartwig also did not appear to have been aware of the chronological problem that underlay this reference. This raises the question of whether Kann's representatives proofread the German translation of Annex A.

258 Regarding Roman law, see Maclean, *Interpretation and Meaning in the Renaissance*, 20.

259 Not all sources used were itemized and not all sources cited in the Hebrew were noted in the German translation. For example, "RHR, Denegata Recentiora, K390-1," Annex A, § 3, was based on the opinions of Rabbis Eliezer ben Joel (d. 1220) and Abba Mari of Marseille (d. ca. 1293). The Hebrew cited the former but not the latter. Neither was included in the list of authorities cited at the end of the translation. See Jacob ben Asher, *Arba`ah ṭurim*, Ḥoshen mishpaṭ 77, with Caro's *Beyt Yosef*.

260 "RHR, Denegata Recentiora, K390-1," Annex A, §6. Hartwig may have been unaware that the word "dinar" appeared in the Vulgate New Testament (Mt. 20.2, Jn. 12.5), for he had become a Lutheran and Luther translated the word as "Groschen." Catholic judges would have been unlikely to know the term from reading the Vulgate, and Catholics were forbidden from owning vernacular Bibles even in the eighteenth century (see Siegert, "Theologie und Religion," 20–21). Catholic judges at the RHR might have recognized the word from their attendance at church where passages from the Vulgate were read out loud, but Hartwig the convert was unlikely to have known this.

al valence for the knowledgeable Hebrew reader: tradents of ancient traditions.[261] The term had to be defined for members of the court. Hartwig explained it in its most basic sense: "rabbis who immediately followed the talmudists and are known by the name *ge'onim*."[262] Who the "talmudists" were and when they lived is not something that the translator expanded on. He must have presumed that the jurists of the RHR knew this.

Hartwig's German translation was not a verbatim rendering of the Hebrew, but it hewed closely to the wording of the original texts. Taking some liberties with the material, Hartwig modestly reorganized it to create a more logical presentation for the German reader and deleted some sections that he thought unnecessary. One Hebrew source mentioned that in the case of an oral loan, the creditor's lien on the debtor's property was grounded in the law of the Torah giving it more gravity than later rabbinic injunctions. Hartwig made no mention of this, as it had no bearing on the argument at hand.[263]

Jewish legal codes assumed familiarity with the concepts and terminology of Jewish law. In discussing a particular form of business partnership, *Shulḥan `aruk* simply said that it was prohibited because one of the parties would have benefited without sharing liability. It was assumed that readers of the legal code knew that there is a biblical prohibition on taking interest, and that this particular type of benefit would have been considered akin to collecting interest.[264] With only one subsection of the pertinent discussion cited by Kann's legal team, Hartwig could make no such assumptions. He reminded the RHR that Jewish law prohibited interest taking and that someone who violated the prohibition was "guilty of a transgression." Hartwig presented the partnership as a creditor-debtor relationship to highlight the prohibition involved and remove any ambiguities.[265] Similarly, *Shulḥan `aruk* discussed how a woman signaled her agreement to a particular type of obligation through "a purchase" or "an act of barter" (*qanah*).[266] A literal translation of this would have made little sense, so Hartwig made the meaning clear: the woman showed her acceptance of the conditions of the transaction through a *Mantelgriff*. This was something that German jurists were familiar with. In this instance, Hartwig may have sensed an opportunity to strengthen Kann's case with his translation in course of the cultural exchange. The use of the term *Mantelgriff* subtly forwarded Kann's interests by strengthening the connection between German law and the case at hand, and reinforced the notion that the use of a *Mantelgriff* was a recognized and well-known practice in Jewish law.

As mentioned above, the Hebrew texts spoke of the transfer of a lien based on using "four ells" of property. This concept was well known to talmudists but foreign to members of the Imperial judiciary. Hartwig added a short note (*Anmerkung*), "nowadays, the giving of four

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261 For an examination of the *ge'onim* and their importance in Jewish culture, see Brody, *The Geonim of Babylonia*.
262 "RHR, Denegata Recentiora, K390-1," Annex A, § 12.
263 "RHR, Denegata Recentiora, K390-1," Annex A, §13.
264 *Shulḥan `aruk*, Yoreh de`ah 176.2.
265 "RHR, Denegata Recentiora, K390-1," Annex A, § 6.
266 "RHR, Denegata Recentiora, K390-1," Annex A, § 21, citing *Shulḥan `aruk*, Eben ha-`ezer 90.17.

ells of land by the debtor has been introduced everywhere to put a lien on movable assets."[267] The note was followed by an impressive list of rabbinic sources. The references included all rabbinic authorities cited in the entire subsection of the annex, but the juxtaposition of Hartwig's note and the list of authorities cited left German readers with the impression that the use of "four ells of land" was a well-established rule of Jewish law.

Despite the years that Hartwig had spent studying law in Giessen, the challenge of correlating it with other systems of law, whether Roman or ecclesiastic, did not always come easily to him. There were points at which he introduced Roman legal concepts and scholarly terminology that he deemed analogous to halakic concepts and terms. The exchange of the common placeholder names in rabbinic literature, Reuben and Simeon, with their Roman Law equivalents, Cujus and Mevius, in the German translation was a felicitous example.[268] However, many matters were not that simple. For example, rendering *ketubbah* as *eingebrachte Güter* suggested that the agreement was a dowry rather than a contract that guaranteed a woman's rights during marriage and lump sum payments in the case of her husband's death or a divorce.[269]

A more severe terminological problem involved Hartwig's description of a creditor's right to collect from multiple debtors who were partners in a loan transaction. According to *Shulḥan `aruk*, the creditor first had to try and collect from each debtor their share of the loan. Only if one party to the loan was unable or unwilling to pay his or her portion of the obligation was the creditor allowed to go to another debtor and collect the entire amount from him or her, leaving the remaining debtors to settle their claims among themselves. According to Jewish law, the debtors were guarantors (Heb., *`areb*) for each other, even if this arrangement was never articulated. There was no discussion of third-party surety in these sources. Nevertheless, Hartwig equated this rule of Jewish law with the Roman law concept of *beneficium ordinis*, according to which a creditor is obliged to first collect a debt from a presumed singular and principal debtor and only in case of non-compliance of the debtor can the creditor turn to a third-party surety.[270]

Beneficium ordinis did not apply in the Kann case for there was no third-party surety, but Hartwig seemed to think that the halakic requirement that the creditor go to each debtor to collect his or her share of the debt before turning to the other debtors to pay the entire sum was somehow akin to *beneficium ordinis*. In the Kann case, Lemele and Fradche Bamberger were surety for each other, and Kann could not turn to one to collect the entire amount without first trying to collect from the other. They were co-debtors who guaranteed each other's liability.[271] This was not exactly equivalent to the *beneficium ordinis* case.

The difficultly of translating this passage was compounded by a Hebrew term, *`areb qabblan*, in the source text. This was a phrase without a clear parallel in western law. It signified

[267] "RHR, Denegata Recentiora, K390-1," Annex A, § 15.
[268] "RHR, Denegata Recentiora, K390-1," bundle 34, Annex A, § 7.
[269] "RHR, Denegata Recentiora, K390-1," bundle 34, Annex A, § 1.
[270] "RHR, Denegata Recentiora, K390-1," bundle 34, Annex A, § 3.
[271] See *Shulḥan `aruk*, Ḥoshen mishpaṭ 77.1.

a guarantor who obligated himself to pay the loan even before the creditor turned to the debtors for payment. Having paid off the debt, the guarantor would then collect from the debtors. In the Hebrew source text, the creditor had to first turn to each debtor unless they expressly stated that they were each an *`areb qabblan* for the other. Hartwig realized the problematics of the term and added a footnote to his translation in which he said that "in this matter, the opinion of the rabbis is divided." He went on to explain that according to "Rabbi Ascher, among others," a co-debtor never has the *beneficium ordinis*, "and therefore in this case […] each of them can be asked for the entire amount and are at the will of the creditor."[272] Hartwig used the term *beneficium ordinis* to make things clearer for members of the RHR, but it was not without its problems.

Citations of rabbinic material had to be expanded and standardized. The Hebrew texts commonly referred to sources by citing the first words of a rabbinic text or rule (like an incipit in canon law) and assumed that the reader would either recognize it or know where to look it up. The German translation had to expand the source citation so that it would be intelligible.[273] Authorities cited were included in each subsection both in Hebrew and in German, but the placement of the citations was different in each. In rabbinic literature, sources were cited in the run of text in parentheses and/or a different font or by using symbols/letters to refer readers to marginal notes. This was generally followed in Annex A, using different colors to highlight and differentiate the various sources and notes from the words of the law. The scholarly references were almost always written using the same size letters as the text itself.

In some contemporary German legal texts, sources were grouped together and cited at the end of legal statements.[274] Hartwig followed this German model in his translation of Annex A. The references were culled from the run of text and presented en bloc at the end of each section. They were written in different colors and in a much larger, clearer, and more ornate hand. The presentation in German gave the visual impression that the law rested on the authority of these highlighted but unintelligible sources rather than on *Shulḥan `aruk* itself. (Figure 3)

272 "RHR, Denegata Recentiora, K390-1," Annex A, §3 note a. "Rabbi Ascher" was a reference to Asher ben Yeḥi'el, a fourteenth-century rabbi whose authority is recognized in Jewish law to this very day.
273 "RHR, Denegata Recentiora, K390-1," Annex A, § 15.
274 See, for example, Beck, *de juribus Judaeorum*.

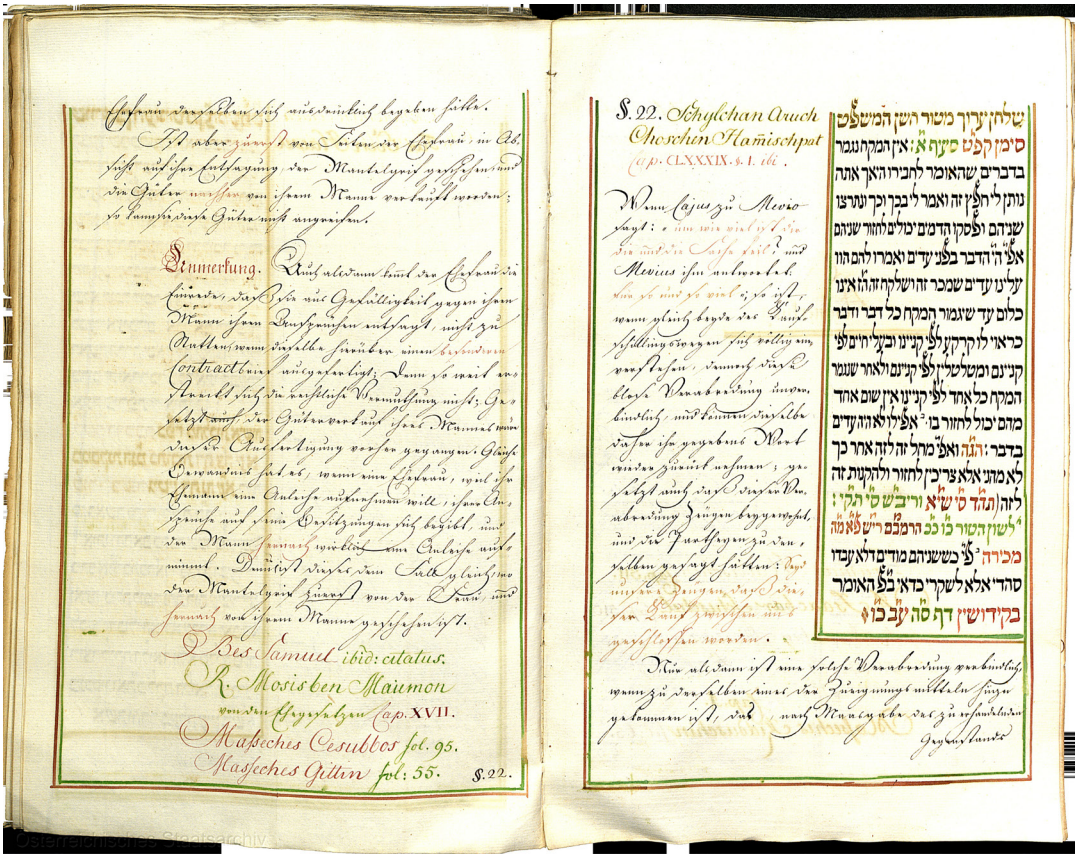

Figure 3: Excerpt from Annex A. Austrian State Archive. ÖStA, HHStA, RHR Denegata recentiora, K390, Fasc. 34, Lit. A, no folio number.

In preparing the translation, Hartwig appears to have done some preliminary research. At first glance, it appears that he transliterated Hebrew titles as a German Jew might say or hear them, not as they were referred to in standard Latin bibliographic texts of the eighteenth century, such as that of the important eighteenth-century German bibliographer Johann Christoph Wolf. Thus, Hartwig wrote "*Cesubbos*" to refer to the talmudic tractate, in contradistinction to Wolf, who listed the tractate as "*Ketuvoth*."[275] Introducing tractates of the Babylonian Talmud as "*Masseches*" was an Ashkenization of the Hebrew term for tractate (*masseket*). The word would have been puzzling to anyone who did not know that Ashkenazic Jews pronounced the Hebrew letter *tav* without a *dagesh* that appears at the end of the word *masseket* as an es rather than a tee. Orthography based on local pronunciation made it difficult for

275 See "RHR, Denegata Recentiora, K390-1," Annex A, § 14. A reader searching for this term in a standard reference work such as Wolf, *Bibliotheca Hebraea*, 2:912, would only have found the reference listed as "*Ketuvoth*." Mendelssohn and Lewin, *Ritualgesetze der Juden*, 128 with the corrections on p. 269, also discussed a "*Ketubah*" rather than a "*Cesubba*." The Italian bibliographer, Bartolocci, *Bibliotheca magna*, 1:498, referred to the tractate as "Chetuuòth."

non-specialist users to find these books in reference works. Yet Hartwig had been trained as a lawyer and he knew that legal works had to be cited in standardized forms.

Hartwig's orthography of the titles of talmudic tractates relied on the work of Johannes Buxtorf (d. 1629), an important early modern Christian Hebraist. Buxtorf listed the names of the talmudic tractates in Latin characters in his *De abbreviaturis Hebraicis liber novus et copiousus*, first published in Basel in 1613 and subsequently updated. Buxtorf wrote *Avoda Sara, Betza*, *Edaeio*, and *Cesubbos* for the talmudic tractates that were written by other Christian scholars as *Avoda zara*, *Bezah*, *Edijoth*, and *Ketuvoth*.[276] Hartwig consistently followed Buxtorf in the Latin character spellings of all talmudic tractates cited in Annex A.[277] Even the spelling of the word *Masseches* followed Buxtorf.[278]

Hartwig further explained the materials for readers without background in Jewish law or knowledge of Hebrew in his accompanying legal briefs to the court.[279] There he enriched the discussion with additional material from rabbinic sources and scholarly literature. He made particular use of Moses Mendelssohn's and Hirschel Lewin's 1778 German compilation of Jewish ritual laws, which he quoted four times for different purposes.[280]

Hartwig made it clear that the legal texts provided to the court were the final word in all aspects of Jewish law, be it matters of property ownership ("mine and yours") or ritual questions and the regulation of personal relationships ("the permitted and the forbidden") without ever getting into the specifics of authorship or identity of the authors of the codes. By including later glosses on *Shulḥan `aruk*, Kann's legal team incorporated scholarly insights that had become part of the Jewish legal corpus into the transcriptions. Hartwig did not explain these sources to the judges at the RHR. For a scholar of Jewish law, this added to the authority of the rulings; for those unfamiliar with the authorities being cited, it may have been a further source of confusion.

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276 Cf. Bartolocci, *Bibliotheca magna*, 1:499; Wolf, *Bibliotheca Hebraea*, 2:897, 902. Buxtorf's orthography was used by others as well, including a seventeenth-century bibliographer who catalogued John Selden's collection ("Bibliotheca Seldeniana," seq. 62), accessed 27 October 2021.

277 Hartwig followed Buxtorf in other matters as well. Buxtorf explained the Hebrew acronym "Rashi" as that of Rabbi Solomon Jarchi and Hartwig relied on this to present Rashi to the German reading audience. See Annex H and Buxtorf, *Abbreviaturis Hebraicis*, 1613, 169. The use of Solomon Jarchi to refer to Rashi was known but exceedingly rare in rabbinic literature (see Luria, *Yam shel Shelomoh*, 5.4). On why Rashi may have been referred to as Solomon Jarchi, see Bartolocci and Imbonati, *Bibliotheca magna*, 4:378, and Azulai, *Shem ha-gedolim*, 116, no. 35.

278 Buxtorf offered brief characterizations of each tractate of the Talmud for the Latin reader and, when explaining the nature of the talmudic tractate *`Eduyyot,* Hartwig cited Buxtorf verbatim in a footnote of sorts. See "RHR, Denegata Recentiora, K390-1," Annex H, with Buxtorf, *Abbreviaturis Hebraicis*, 1708, 258. Hartwig's reference to the specific page in Buxtorf makes it clear that he was using the 1708 edition, because the information does not appear on this page in earlier editions.

279 "RHR, Denegata Recentiora, K390-1," bundle 34.

280 Mendelssohn and Lewin, *Ritualgesetze der Juden*. Joseph II favored accepting the work into Austrian law. On this, see Manekin, "Moses Mendelssohn and Joseph II," 289–294; and "The Law of Moses," 238–240.

Annex C

Kann's legal team presented the RHR with other Hebrew material that they believed advanced their case. Annex C was an almost verbatim Hebrew transcription of the notarized copy of the agreement signed by both Fradche and Lemele that the scribe and local notary Israel Schwarzschild recorded in his *pinqas ha-ne'emanim* (notary's record book) in 1777.[281] Annex C concluded with the following statement by the notaries of the community.

> Everything above, with the signatures of the aforementioned Mrs. Fradche and her husband, the honorable, aforementioned Lemele, and the signatures of the late aforementioned [notary] Me'ir of blessed memory, and the aforementioned [notary] Wolf of blessed memory, is a word for word copy from the very aforementioned *Mantelgriff*. And as proof of this we have signed below, today Friday, the eve of the Sabbath, 4 Tevet [5]545. The insignificant Israel, son of my father and master the honorable Yehiel Michel Schwarzschild of blessed memory; the insignificant Asher Anshel, son of my father and master, the honorable Solomon Zalman Pfann Katz of blessed memory. Everything above we have copied word for word from the copy of the *Mantelgriff* that was validated by the signatures of the aforementioned notaries without any change, or anything missing or added at all.[282]

Despite their emphasis on the accuracy of the transcription, there was a major discrepancy between the sources. Annex C included the signatures of both Fradche and Lemele Bamberger on the contract. (Figure 4) This was not to be found in Schwarzschild's *pinqas.* (Figure 5) There were no signatures of the Bambergers in the scribe's *pinqas*. This was not surprising, as there was no expectation that the notarial record should be signed by the parties. Notaries were essentially officers of the court, unimpeachable witnesses who testified to the validity of the transaction.[283] As in all contractual transactions, the scribe copied the contract, made a marginal note in which he listed the two notaries who witnessed the agreement, and then, presumably after he finished, he noted under the names of the notaries that the contract had been given to the creditor. This was done so that the creditor (in our case, Kann) could use the contract to collect his debt. The notarial record was an official court record that attested to the parties having agreed to the transaction, not a copy of the contract. Kann's legal team added the signatures of Fradche and Lemele Bamberger to the materials submitted to the court. This gave additional credence to Kann's position before the non-Jewish authorities because the contract as presented met the requirements of the local custom mentioned earlier,

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281 See Schwarzschild, "Pinqas ha-ne'emanut," fol. 160r. Kann's legal team claimed that this was a "letter by letter" true copy but there were minor differences between the original entry in Israel Schwarzschild's *pinqas* and Annex C, for the annex included some honorific titles not attributed to the litigants in the original.

282 "RHR, Denegata Recentiora, K390-1," Annex C.

283 See Nussdorfer, *Brokers of Trust*, 86–88.

that a woman could only be held responsible for her husband's debts if she had signed the debt agreement.[284]

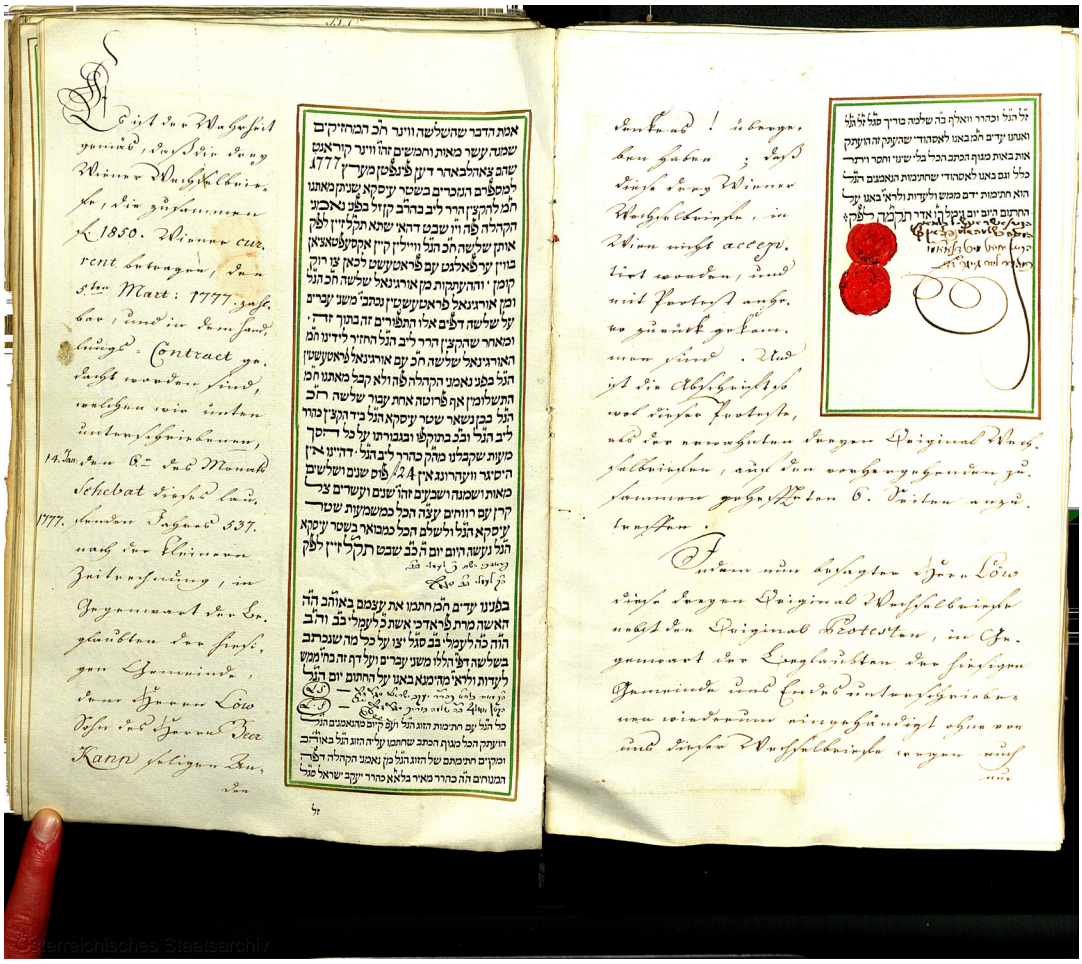

Figure 4: Excerpt from Annex C. Austrian State Archive. ÖStA, HHStA, RHR Denegata recentiora, K390, Fasc. 34, Lit. C, no folio number.

284 Others were careful to note that a person had signed the document in addition to performing the *kinyan sudar*. See the case of Lemele Moses Mannheim who set up his will according to Jewish law, signed it, and performed a *kinyan sudar*. Nevertheless, it was contested in a non-Jewish court. The case was discussed at some length in Kayser and Klipstein, *De autonomia Iudaeorum commentatio academica*, 100–103.

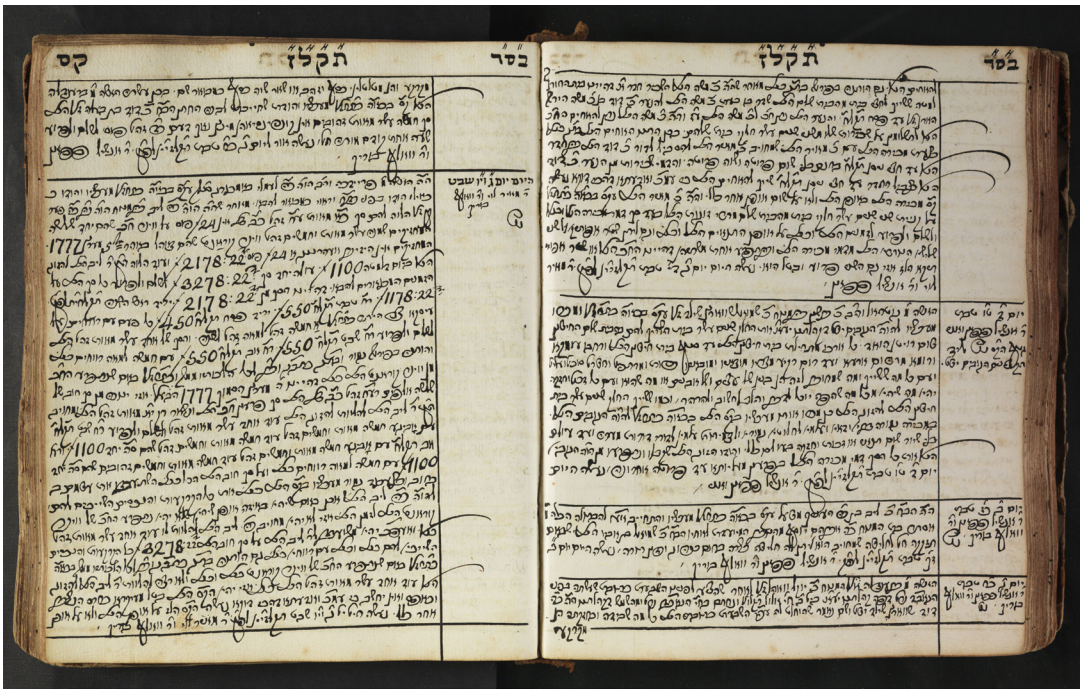

Figure 5: Israel Schwarzschild, "Pinqas ha-ne'emanut" National Library of Israel. MS Heb. 3476=38, fol. 160a.

Hartwig noted that he faithfully rendered the text into German according to the original *Mantelgriff*, yet he may have been aware of the discrepancy here. When he described the signatures of the Bambergers, he spoke "auf die Artschrift der Frau Freudge und ihres Ehemanns, des Herrn Lemle." "Artschrift" was not a synonym for "Unterschrift" ("signature").[285] And Hartwig was familiar with both terms. He described each signature of the witnesses, Me'ir Levi and Wolf Burich, as "Unterschrift." Despite Fradche and Lemele's signatures being present at the end of the Hebrew version of the contract in Annex C, the translator seems to have been trying to obscure the issue and avoid a blatant lie.

285 The term was so uncommon that neither Grimm and Grimm, *Deutsches Wörterbuch*, nor Zedler, *Universal Lexicon*, included it in their dictionaries.

Annex E

Kann's legal team was not satisfied to present the court with traditional halakic texts. To bolster Kann's case, it turned to the local ordinances of the Frankfurt Jewish community. For centuries, individual Jewish communities in Europe had enacted bylaws to deal with their developing needs and concerns in the realms of commerce, taxation, morality, and much more. In Frankfurt, the *pinqas qahal,* or the main record book of the Jewish community, reflected some two and a half centuries of internal Jewish communal legislation.[286] Written in Hebrew and Judeo-German, and often a mix of both, the *pinqas* contained the rules and rulings of the communal leadership and its contents were binding on members of the Frankfurt Jewish community.[287]

Including ordinances from the *pinqas* as black letter law before the RHR demanded a definition of the character of the material and an explanation of how it could be considered a legal source. Kann's team explained to the justices that the *pinqas* was a "book of the community" (*Gemeinde-Buch*).

> In this book everything that the community, in consultation with the rabbis and other Jewish scholars, deems necessary and advisable to order is written. Such ordinances are then made known by the servant of the community in public assemblies, as for example, in the synagogue. From the moment that they are made known, they oblige every member [of the community] and are like all other statutes, the primary precept (*die erste und vorzüglichste Richtschnur*) that members of the community are obliged to follow.[288]

Procedurally speaking, the translation simplified the legislative process. While the *pinqas* specified the officials involved in the decision-making process of *taqqanot* ("ordinances"), the translator conflated these hierarchies and rendered them as "die Gemeinde" (the community). This masked the intricacies and inconsistencies of decision making in the Jewish community and strengthened the perception of the authority of rulings in the *pinqas.* The goal of the explanation was to define what the communal *pinqas* was and make it clear to members of the RHR that this unpublished, internal source, obligated all members of the Jewish community of Frankfurt. It was no less a source of law for the Jews of Frankfurt than

286 Regarding the character of the main *pinqas* in contemporary communities, see Litt, *Pinkas, Kahal, and the Mediene*, 7–11. There were many different types of private and communal *pinqassim* (pl.) in use in Frankfurt and elsewhere throughout the early modern period. There were *pinqassim* for recording business transactions, record books for payment of dues, taxation, charity, and more. For a list of the *pinqassim* in seventeenth and eighteenth-century Tykocin, see Nadav, *Pinqas qahal Ṭiqṭin*, 1:xx–xxii. Regarding Metz, see Berkovitz, *Law's Dominion*, 26–27. Useful material about communal *pinqassim* can be found at http://web.nli.org.il/sites/NLI/English/collections/jewish-collection/pinkassim/Pages/default.aspx, accessed 7 February 2019.

287 The Frankfurt *pinqas*, now in the National Library of Israel, is available online at https://www.nli.org.il/he/manuscripts/NNL_ALEPH000044529/NLI#$FL15735226, accessed 28 June 2022.

288 "RHR, Denegata Recentiora, K390-1," bundle 34, pp. 45–46.

municipal rules or canonical texts of Jewish law.[289] Kann's legal team presented the material in Annex E as *Auszug aus dem Gesetzbuche der Gemeinde* ("an extract from the law-book of the community").

Whether or not everything in the *pinqas* could really be labeled the equivalent of law is a matter that Friedrich Christian Hartwig was sensitive to. Hartwig did not label all material that he cited from the *pinqas* as law. One citation was called an ordinance (*Verordnung*), another a resolution (*Schluss*), and a third was considered a law (*Gesetz*). Hartwig never explained his choice of terminology, yet from his translation it seems that how a ruling was created determined its status. When the communal leaders agreed to a practice and formulated their decision, it was a *Schluss*. When the *Schluss* was brought by the communal leadership to the chief rabbi of the community for his approval, and he approved, it was then publicly announced in the synagogue for all to hear. Through this procedure it became a *Gesetz*.[290] A *Verordnung* was a practice agreed upon by the communal leadership in consultation with the rabbinic leadership, but it was never formally announced in the synagogue. It was recorded in the *pinqas* and had implications for members, but it had a lesser status than a *Gesetz* and it is not clear how it was made known to the community at large.

Gaining access to the *pinqas* was not a simple matter. The Frankfurt Jewish community, like some other Jewish communities, was not anxious to let just anyone see its *pinqas*.[291] According to community rules, not even elected communal leaders were assured access to it.[292] The rationale for this secretive stance is unclear, but Kann himself, and perhaps his children, would have known that a relatively recent episode involving the Kann family might have even reinforced the community's resolve to limit access to the material.

In the 1750s, a dispute centered on finances and communal authority between Leb Kann's grandfather, Isaac Kann, and Yuda Kulp raged in the Jewish community of Frankfurt. During the squabble, Kulp requested to see the communal record book. His request was denied by the community, which feared possible negative repercussions. Kulp went to the authorities

[289] See Berkovitz, *Law's Dominion*, 26–28. On the nature of communal ordinances in contemporary Jewish communities in general, see Litt, *Jüdische Gemeindestatuten*, 10–19.

[290] "RHR, Denegata Recentiora, K390-1," bundle 34, Annex E, no pagination (section 3). "Es ist bey der Gemeinde der Schluß gefaßt, von dem Rabbiner derselbe genehmigt, und hierauf als ein Gesetz angeordnet, und öffentlich bekannt gemacht worden […]" The Hebrew texts use the word "*taqqanah*" both for what was decided (*`alah ha-muskkam*) by the leadership and what was jointly agreed upon by the communal leadership and the chief rabbi. Hartwig distinguished between the two. Some caution is required since Hartwig did not offer a running translation of the entire *pinqas*.

[291] The situation was similar in Altona-Hamburg (see Kaplan, *The Patrons and Their Poor*, 24–25). Discretion was also expected of those who took part in meetings. It was assumed that communal leaders would not leak information about what was discussed, yet this may not always have been the case. In June 1795, the community instituted an oath for members of the leadership to ensure that they did not discuss with others what took place during meetings, an ordinance that was endorsed by the rabbinic leadership. See the material published by Kamenetsky, "Frankfurṭ ha-ma`aṭirah rabbaneyha," 281–284.

[292] In the mid-seventeenth century, there were rules that differentiated between elected leaders, granting eight leaders a higher status than the other four. See Segall, "Ḥomer le-pinkas ha-kahal," no. 279, from 1661.

in Frankfurt to force the Jewish community to give him access to the records, which they did. The Jewish community appealed the decision to the RHR. The entire affair led to an increased involvement of the Frankfurt municipality and the emperor in the workings of the Frankfurt Jewish community, at least into the 1760s.[293] If the Jewish community was concerned about granting individuals access to the *pinqas* before the Kulp-Kann dispute, they must have been doubly concerned thereafter.

Kann's legal team emphasized that they had gone to great lengths to convince the Jewish community to allow them to copy material from the *pinqas*.[294] Ultimately, they succeeded in doing so. Receipts in the annex presented to the RHR show that the Frankfurt-Jewish communal scribe Wolf Jacob Speyer was paid to make copies of the relevant sections of the *pinqas* for Kann. Speyer did so under the watchful eyes of the communal leaders.[295] However, the communal leaders must not have been paying very close attention to what was copied. One of the passages that Kann's legal team copied from the *pinqas* and eventually presented to the RHR documented an incident of internal strife as well as dishonesty, which portrayed the community in a negative light.[296]

Kann's side was interested in a section from the Frankfurt *pinqas* that discussed the creation of valid contracts. More than 150 years earlier, the community enacted a *taqqanah* that would take effect in mid-January 1627. It demanded that all contracts between Jewish residents of Frankfurt be signed and validated by the notaries of the community. The notaries were to establish a special book for the purpose of recording the names of the parties, the sum of the transactions, and attesting to the proper performance of the *Mantelgriff*. According to the ruling, if the communal notaries had not signed an affirmation that the contract conformed to the rules of the community, it was deemed invalid and worthless, "like a broken potshard."[297]

This section of the *pinqas* opened with a line that was problematic from the perspective of the Jewish community. "Since it is well known and publicized that until now there have been various squabbles and there has been dishonesty regarding contracts, testimonies, and signatures, therefore, in order to remove this impediment […]."[298] This was a challenging statement for the Jewish community, even if it described life a century and a half earlier, because it admitted to dishonesty and false testimony in the Jewish community. Repeating these claims in 1785 in a German translation sent to the emperor's court in Vienna would not have been wise. Hartwig was sensitive to this and emphasized that false contracts were

293 On the Kann-Kulp dispute, see Kracauer, "Die Kulp-Kannschen Wirren," 5–78; Gotzmann, *Jüdische Autonomie*, 703–712.

294 "RHR, Denegata Recentiora, K390-1," bundle 34, pp. 47–48.

295 Ettlinger, "Ēlē tōldōt," Wolf Jacob Speyer 4.XI.1812.

296 See for example, "RHR, Denegata Recentiora, K390-1," Annex A, §§ 4 and 22, where mention of bribery and lies in the Hebrew text were omitted from the translation.

297 "Pinqas Frankfurt," fol. 75b, no. 135. The entry is mistakenly labeled as no. 136 in Segall's transcription of the *pinqas*. A broken potshard as a metaphor for worthlessness has a long history in Hebrew literature, perhaps none more powerful than in the liturgy for the High Holidays (*u-netanneh toqef*).

298 "Pinqas Frankfurt," fol. 65v, no. 135.

part of the past, not the present.[299] His mediation of the material in translation suggests that he maintained feelings of solidarity with his former coreligionists and tried to protect them.

It was the very next portion of the *pinqas* that Kann's legal team was most keenly interested in, as it dealt with the liability of a woman for her husband's debts. According to a ruling made in mid-January 1627, the day before the above-mentioned ordinance regarding the need to register loan agreements was to come into effect, the communal leadership of the Jewish community of Frankfurt wrote,

> since there was already an ordinance from the earlier generations that every woman is obligated to pay together with her husband all the debts that her husband contracted with a *kinyan sudar* and she does not have the right or ability to say that the lien established by her *ketubbah* and any additional amount [that her husband obligated himself to give her at the time of their marriage] preceded [the husband's debts] to exclude the wife from this [current] debt.[300]

The ordinance noted that this was not a new rule, but in 1627 the community felt the need to strengthen it because it perceived that it was not being widely observed. The ruling gave wives the possibility of escaping liability for their husband's loans if a woman sought out the notaries (*ha-ʿedim ha-memunnim*) in advance of the performance of the *kinyan sudar* and declared before them that she categorically refused to accept liability for any loan that her husband made without her knowledge.[301] This ordinance was of paramount importance to Kann for it fully substantiated his claims against Fradche Bamberger.[302]

The 1627 ordinance did not specify whether a wife had to sign the loan agreement or be present at the time that her husband contracted the loan. In the winter of 1784–1785, the Frankfurt magistrate questioned two leaders of the Jewish community as to whether a wife's signature on the contract was necessary. Abraham David Wimpfen and Model Moses Braunschweig confirmed that the *pinqas* included a law that Jewish women in Frankfurt had to

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299 "Da die älteren Streitigkeiten, welche durch verfälschte Contractbriefe und deren Unterschrifft entstanden und noch täglich entstehen, allgemein bekannt sind; so hat um diesem Uebel Einhalt zu thun, die Gemeinde, mit Zuziehung der Rabbinen, einstimmig für gut befunden…" ("RHR, Denegata Recentiora, K390-1," bundle 34, Annex E).

300 "Pinqas Frankfurt," fol. 75v, no. 136. This section was not transcribed by Segall.

301 In an addendum to the ordinance, the communal leadership stated that this rule only applied if both the debtor and creditor were residents of Frankfurt. If any of the parties to the loan lived outside Frankfurt, "the law of the Torah" was the guiding rule.

302 The issue was revisited by the community in 1788, after the Kann-Bamberger case had reached the RHR. At this time, the community made specific reference to the ruling of 1627 and said that this rule could no longer be observed as instituted, and that all loan contracts had to be made with the knowledge of the borrower's wife. If, despite the rule, a contract was made without the wife's knowledge, her lien preceded those of subsequent creditors. See "Pinqas Frankfurt," fol. 266r, no. 499. Also see Kaplan, "Women and Worth," 107–112, who noted that in late 1788, the communal leadership decided to change the ordinance because "times have changed." As Kaplan pointed out, changing the ordinance was not a simple matter and, to do so, the communal leadership instituted different rules for contracting loans.

repay the loans of their husbands even if they did not sign the contract.[303] Significantly, they added that "this law has never been put into practice," namely, that wives generally did sign such contracts.[304] It seems that despite the rule in the *pinqas*, Jewish merchants of Frankfurt took certain standard legal precautions to protect themselves. "Rather until this very hour it is still customary and required that on each and every contract that will bind a woman, including those that will be written as *stores* [contracts] afterwards, her signature is required to prevent any objections that she tacitly agreed to a loan only to please her husband and not to disturb the domestic peace."[305] This was confirmed in subsequent meetings with other Jewish communal leaders who checked with their colleagues and "Jewish scholars" (*Jüdischen Gelehrten*) on the matter.[306] Fradche Bamberger signed the contract in keeping with common practice but this act ostensibly contradicted the communal ordinance and cast doubt on the legitimacy of communal ordinances as a source of law. Kann's legal team felt it had to show that directives recorded in the *pinqas*, including those that obligated a woman to pay for her husband's debts, remained valid and binding. To do so, they used rabbinic legal sources and reasoning.

Rabbinic Logic

According to the Mishnah, a second-century code of Jewish law that was accepted as authoritative by all Jews, and was the basis for the development of both the Jerusalem and Babylonian Talmuds, "no rabbinic court can cancel the rulings of its fellow rabbinic court unless [the latter court] is greater than it in number and wisdom. If it was greater in wisdom but not in number, in number but not in wisdom, it cannot cancel its rulings until it is greater in both wisdom and number."[307] Kann's team cited this source to claim that the original ordinance of the community was valid regardless of contemporary practice or failure of the community to enforce the original ordinance. However, it was not self-evident that a communal ordinance made by the community of Frankfurt was the equivalent of a ruling of a rabbinic court (*beyt din*), as discussed by the Mishnah. To be sure, the rabbi of Frankfurt had

303 This is the implication of "Pinqas Frankfurṭ," no. 136, from 1627.

304 Abraham Wimpfen was a *parnas* of the Jewish community (see Horovitz, *Sefer abney zikkaron*, no. 4054). It is not clear whether Model Braunschweig was as well. Braunschweig's name does not appear in the Frankfurt *pinqas*. However, his entry in "Frankfurt *Memorbuch*," fol. 467v, p. 933(1), describes him as a person who was *pirnes u-menahel be-derek yesharah* (lit., "he provided and ran his affairs honestly"). This is most likely a reference to the care of his household, but it could be more expansive and refer to his role in the community.

305 "RHR, Denegata Recentiora, K390-1," annex F, nos. 182, section II.f.

306 "RHR, Denegata Recentiora, K390-1," bundle 34, annexes F and G.

307 *ʿEduyyot* 1.5.

a role in the process of creating a communal ordinance, but the *pinqas* reflected the decisions of the lay leadership, not a rabbinic court.[308]

To connect the Mishnah to the case at hand, Kann's legal team invoked two classic commentaries on the Mishnah. One, written by Rabbi Obadiah of Bartenura (Bertinoro) in the fifteenth century, described the requirements for greater knowledge and number outlined by the Mishnah as also applying to the legal decisions of a scholar who headed a yeshiva, namely, in order for the head of a yeshiva to overturn the ruling of the head of a yeshiva from an earlier period, the later scholar's erudition had to clearly be superior to that of his predecessor. As for number, there had to be more students in the later yeshiva than in the previous one. Kann's advocates developed this idea. According to Obadiah of Bartenura, the Mishnah was not necessarily concerned only with a rabbinic court; its procedural requirements could also pertain to a yeshiva. While this opinion did not specifically address the decisions of a community, it nudged the rabbinic court out of the focus of the discussion and Kann's team then developed the idea further.[309]

A second commentator on the Mishnah, Rabbi Yom Tov Lipmann Heller (1579–1654), provided further material for Kann's side to advance their claim. Heller was a widely accepted Ashkenazic authority. A native of Wallerstein (Bavaria), he served as rabbi in Prague and Vienna before becoming the rabbi of Cracow. His commentary on the Mishnah had been reprinted numerous times and, together with Obadiah of Bartenura's work, was a standard feature of the printed Mishnah by the second half of the eighteenth century.

Heller suggested that when the Mishnah spoke of the rulings of the court, it was a reference to "ordinances, restrictive laws, and customs" (*be-taqqanot, ve-gezeyrot u-minhagut* [sic]).[310] This was a spot-on proof for the claims of Kann's legal team because here Heller had explained a canonical rabbinic legal text to say that even communal ordinances cannot be invalidated by subsequent rabbinic authorities unless very specific conditions are met. Kann's legal team now had to make it clear that the rabbis of late eighteenth century Frankfurt were not greater "in number and in wisdom" than those who preceded them. If they could do so, the testimony of Wimpfen and Braunschwieg about contemporary practice that was cited by the Baumeister would be neutralized. Kann's team could argue that the original ordinance remained in effect and could not be revoked, even if it had not been observed.

To accomplish this, Kann's legal team followed a reference that Heller left in his commentary. In a different section of the Mishnah, Heller had expanded on the topic of abolishing

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308 See "RHR, Denegata Recentiora, K390-1," bundle 34, Annex E, section 1.

309 The validity of Obadiah of Bartenura's comments are questionable. It appears that he relied on Maimonides's comments on the same Mishnah (*Commentary on the Mishnah*, *`Eduyyot* 1.5), but distorted them. Maimonides said that in order to change an earlier ruling, the president of a later court (*ro'sh yeshibat zeh ha-beyt din*) had to be greater (more learned) than his predecessor. Obadiah seems to have made a leap and understood the term "*ro'sh yeshibah*" to mean the head of a talmudic academy. This allowed him to explain the numerical factor of the *mishnah* as referring to the number of students in the yeshiva, not a rabbinic court.

310 "RHR, Denegata Recentiora, K390-1," bundle 34, 54–57.

ordinances made by earlier authorities. There he wrote that "since there is absolutely nothing that is done in numbers [*be-minyan*; i.e., an ordinance made by a court of stature] that is canceled by itself and it is necessary for a number [i.e., a court of equal or greater status] to allow it."[311] Basing himself on the words of Rashi, Heller explained that even if the rationale for an ordinance disappeared, the ordinance could not be abolished without formal action by a later court. It was immaterial whether people observed the ordinance or not. Once an ordinance was instituted, it remained valid until it was formally abrogated or altered.

Heller found additional support for his reading of the Mishnah in Maimonides's *Mishneh Torah*, and the Hebrew scribe who prepared the annexes submitted to the RHR highlighted the source of the citation. However, Kann's advisors were less than forthcoming about Maimonides's view. It was true that in his *Mishneh Torah* Maimonides said that an ordinance that had been made by a court required a greater court to abrogate it, however, Maimonides inserted a condition that Kann's legal team did not care to cite. Maimonides wrote, "a court that ordered a restrictive decree or made an ordinance or instituted a practice and it spread throughout Israel, and a different court subsequently arose that wanted to cancel the original ruling and uproot the ordinance, or the restrictive decree, or the custom, it may not do so until it be greater than the original individuals in wisdom and in knowledge […]."[312] What Kann's legal team did not want to mention was that Maimonides ruled that the ordinance had "to have spread throughout Israel," that is to say, it had to have been observed by everyone before it attained the status of a ruling that had to be canceled by a greater court. This position did not advance Kann's cause because his legal team wanted to argue that actual practice was immaterial to the validity of an ordinance. To do so, in the German translation they conveniently omitted the condition of widespread use that Maimonides had stipulated.

To complete the connection between the rabbinic sources and Kann's claims, it had to be shown that the rabbis of Frankfurt had had a role in making the ordinance in the early seventeenth-century. This was relatively easy for an entry in the *pinqas* from 1654, copied out and presented to the RHR, specifically said, "it was agreed to by the community [*ha-ḥabarutah qaddisha'*], may our Rock [=God] guard and save them, and with the agreement of the outstanding scholar, head of the rabbinic court […]." There was little left to prove. Yet Hartwig, perhaps following the directions of Kann's legal team, aggrandized the role of the rabbi in the process to make the rulings of the *pinqas* fit more neatly into the mishnaic rules that had been invoked. Hartwig tried to show that the observance of the ruling or lack thereof was irrelevant to its legitimacy. The enactment of the rule through a decision of a rabbinic court gave it validity until it was formally canceled by a court that was greater than the original one in both quality and quantity.

The only thing that remained for Kann's representatives to demonstrate was that the rabbis of the eighteenth century were not of the same stature as those of the seventeenth century.

311 *Tosafot Yom Ṭob, Ma`aser sheni* 5.2. Although he did not cite Maimonides, Heller seems to have based his understanding of the passage on Maimonides, *Mishneh Torah*, Laws of Disobedience (*Mamrim*) 2.2.

312 Maimonides, *Mishneh Torah*, Laws of Disobedience (*Mamrim*) 2.2.

Rabbi Pinhas Horowitz and the members of the rabbinic court of Frankfurt of the late eighteenth century, including Rabbis Me'ir Schiff and Nathan Maas, were by all accounts outstanding rabbis. Whether they were greater than the likes of Rabbi Joseph Hahn Nördlingen (d. 1637), who was a native of Frankfurt and was active in the Jewish community when the original ordinance was made is unclear, but Kann's advisors took it as a given that Horowitz and the members of the Frankfurt rabbinate of the late eighteenth century would not see themselves as greater than their predecessors. In the plea, Hartwig argued that even though the rabbis of contemporary Frankfurt were certainly the "greatest teachers of their time and were famous and honored far and wide," even they would not be able to overturn previous rabbinic decisions. The current rabbi of Frankfurt "would blush if one suggested that he is greater in wisdom than his predecessors and the decrease of students is apparent."[313] Thus, Kann's legal team maintained that the ordinance remained in force and could not be canceled.

Kann's legal team presented this entire discussion to the court at great length. They cited fully the relevant sections of the Mishnah as well as the commentaries in Hebrew and itemized each of the sources that they quoted. As in Annex A, the transcriptions of the Hebrew material submitted to the RHR in Annex E were beautiful pieces of workmanship. The Hebrew passages were framed within colored borders. Headwords were written in color and dates were recorded in either red or green. The scribe highlighted in large green letters what the Kann legal team thought were the central passages of the *pinqas* that supported Kann's argument. Highlighting, color, and significantly larger letters were also used to honor the authority of the Frankfurt magistrate, although non-Hebrew readers would probably not have noticed this unless someone pointed it out to them. (Figure 6) This flair was entirely missing from the original communal ordinance recorded in the Frankfurt Jewish community's *pinqas*. There the ordinance was written in a semi-cursive hand in plain black ink. There was no highlighting, here and there words were crossed out, and some words were written in above the line. The *pinqas* itself was a functional document, not an ornate presentation of the law to the emperor's court in the capital of the Empire. (See Figure 7)

313 "RHR, Denegata Recentiora, K390-1," bundle 34, fols. 54, 55. See too "Pinqas Frankfurṭ," fol. 266r, no. 499, where the communal leadership of the 1780s would not cast aspersions on the leadership of the 1620s and, indeed, assumed that the earlier generations were greater than the current one.

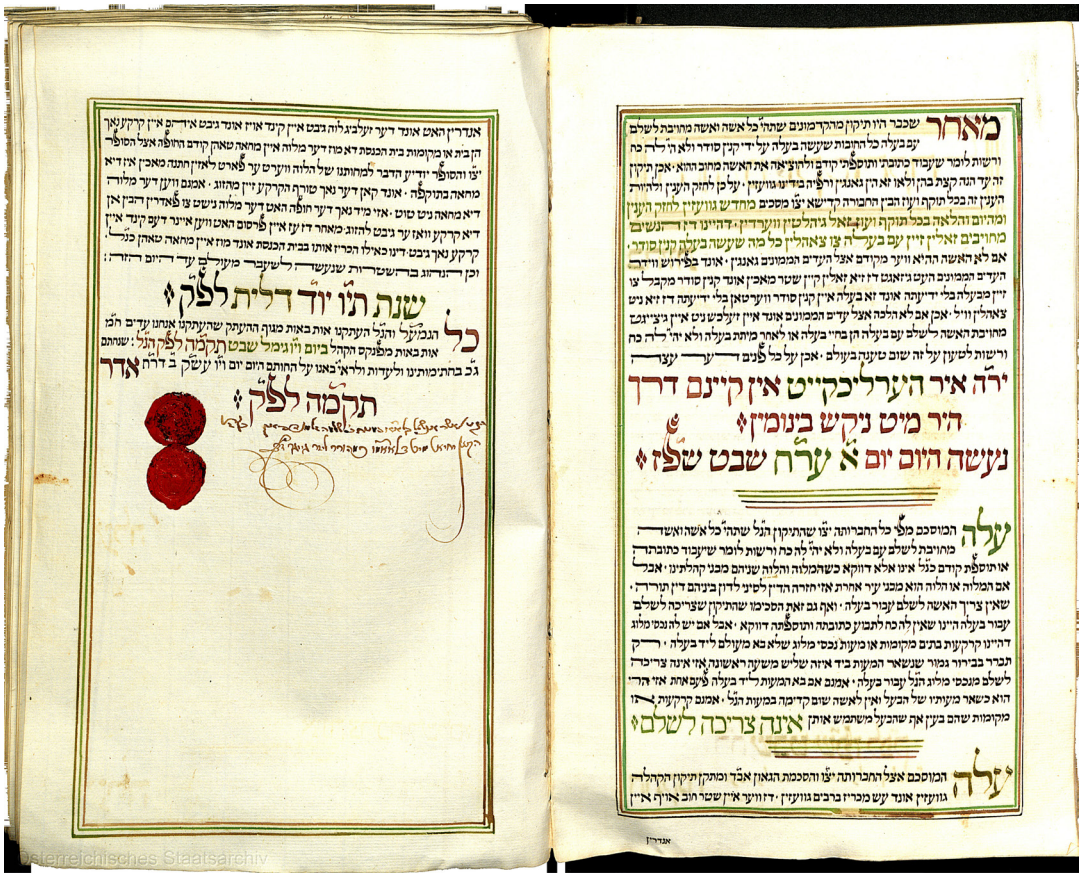

Figure 6: Excerpt from Annex E. Austrian State Archive. ÖStA, HHStA, RHR Denegata recentiora, K390, Fasc. 34, Lit. E, no folio number.

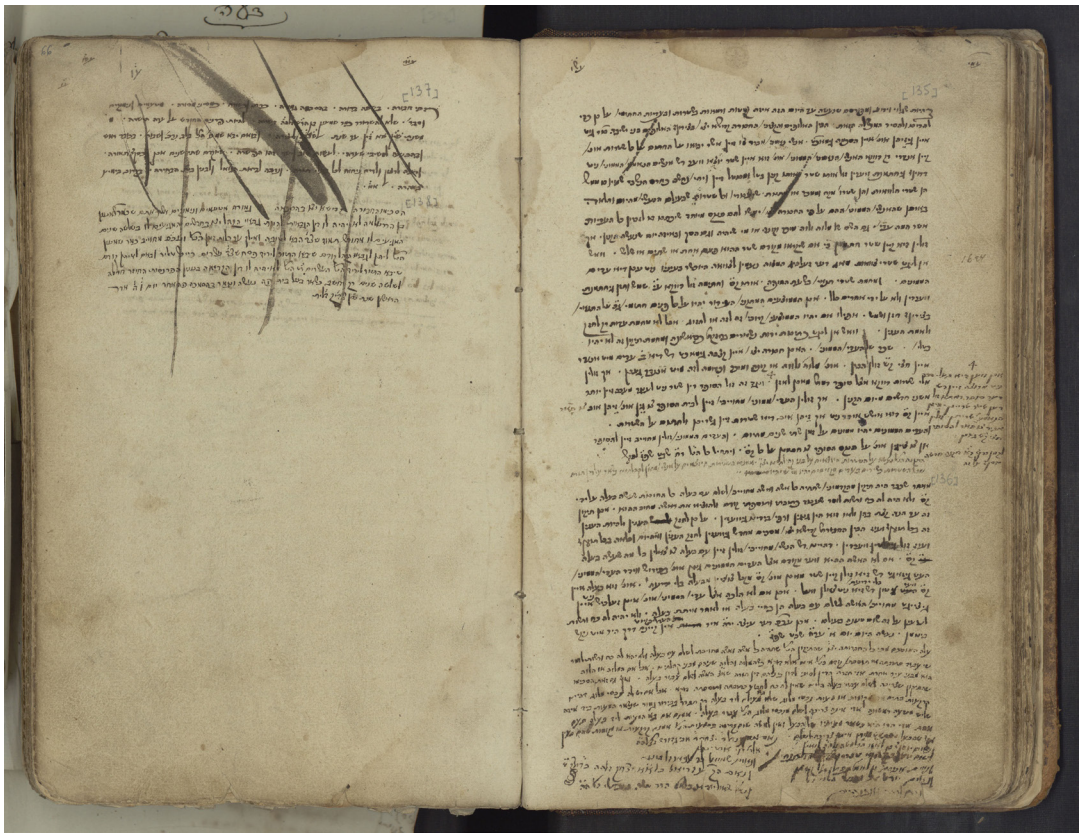

Figure 7: "Pinqas Frankfurt," National Library of Israel. MS Heb. 2°662, sections 135–137.

The highlighting of the transcription of the *pinqas* did not carry over into the translation of this source. The calligraphic embellishments of the dates that appeared in the Hebrew transcription which emphasized the antiquity and thus the authority of these rulings were totally absent in the German translation, which was written in plain black ink. One of the main arguments in the *pinqas* passage regarding the liability of a wife for her husband's debts was underlined in the German in parallel to the highlighting of the Hebrew text, yet it is difficult, if not impossible, to say whether the underlining was added by Hartwig or by a subsequent reader. A different passage that might have suggested circumstances under which a woman would not have to pay for the debts of her husband was not.

It was assumed that the judges of the RHR could follow the logic of the rabbinic argumentation, even though this demanded time, patience, and effort. From a methodological perspective, expanding on textual commentaries of the Mishnah as a basis for practical legal conclusions was questionable. Legal decisions are usually based on legislation, legal works such as responsa, codes, and the commentaries of legists on codes. A novel interpretation of the law predicated on the commentaries of Obadiah of Bartenura – who was not a recognized legist – and Yom Tov Lipmann Heller on second-century texts was unusual. Kann's

legal team exploited the Christian judges' lack of knowledge about the norms of the halakic decision-making process to forward their client's interests.

Hartwig applied a positivistic, normative understanding of laws that stemmed from rabbinic and communal legislation. This echoed the understanding of the authors of the *pinqas* themselves, who invoked similar notions regarding the renewal of older rulings. The ordinance from 1624 specifically stated that "although this ruling has not been closely observed until now, the community ruled unanimously to keep it and to enforce its power with another ruling. To this end the community issues anew that from now on and in the times to come it will be seriously observed […]."[314] Here, lack of observance was a reason to reinforce an ordinance, not abolish it.

While the notion of promulgated law as a source of authority without respect to custom may be obvious to a modern reader, this was not the case for people in the early modern period. As Thomas Simon has shown, in the legally pluralistic societies of early modern western Europe, the validity of a law was not only determined by the process of legislation but by the application of the law.[315] If a legal ruling was not observed over time, it lost its authority.

The Frankfurt Jewish community was aware of these issues. In the 1770s and early 1780s, it had argued a case against the Frankfurt magistrates before the RHR in which it maintained that because community members had not observed repeated rulings of the magistrates concerning market regulations over a few decades, the rulings had never acquired legal standing and therefore could not be enforced.[316] This argument was not rejected by the Imperial court. Kann's legal team either saw things differently or believed that the authority of rules established according to secular law stemmed from different sources than those established according to Jewish law. The magistrates of Frankfurt and the jurists of the RHR might have found this to have been a specious, if not spurious, argument.

All this took place as Kann lay bedridden, unable to function, in Frankfurt. He died on 13 November 1785.[317] Just as debts can be intergenerational, so too were the court proceedings, and the case continued even after Kann's demise.

Closing the File at the RHR

After Kann's legal team submitted all the relevant material to the RHR, the court gave the Bambergers the opportunity to respond. Bamberger's legal counsel asked for five two-month deferrals to produce the following response, which extended the case into the summer of 1786. During this time, Bamberger's Frankfurt lawyer, Johann Friedrich Münch, moved or

314 "RHR, Denegata Recentiora, K390-1," bundle 34, Annex E, section 2, citing "Pinqas Frankfurṭ," fol. 75b, no. 136.
315 Simon, "Geltung."
316 Kasper-Marienberg, *Vor Euer Kayserlichen Mayestät Justiz-Thron*, 177, 178.
317 "Frankfurt Memorbuch," fol. 297v, p. 593.

retired, and a new legal advisor, Martin Schmidt, took on the case.[318] Faced with a daunting task and a new legal advisor who was unfamiliar with the case, Bamberger wrote to the RHR agent in March 1786 that he did not believe it possible to respond to this Jewish law compilation.[319] He argued that since it was a case of Jewish law it should be referred back to a Jewish court. He wrote,

> With great astonishment I learned from your letter from the fourth of this month that impossible things are being asked of me in the shortest of time and although I did not spare any effort or costs to finish the response, still my adversary twisted the case so much that in fact two Jewish scholars have been working for four months and do not even have half of it ready. Your most noble high judges can only see with mercy that my adversary is a Jew, and our point of contention is a Jewish *stares* (contract) letter and is therefore based on Jewish law. Why did he not litigate in front of Jewish scholars given that Frankfurt has one of the greatest Jewish universities [i.e., yeshivas]? He probably understood that he would not find salvation (*Heil*) in front of the Jewish judges. That is why he turned to Christian law. Even all his writings in the first instance and at this highest of all courts, everything until the most recent writing had been in German. However, after I responded to him in proper German he now comes before the Christian judges and wants to be judged according to Jewish law. He probably knows that all his explanations would be considered by Jewish scholars only as *Chartequen* [i.e., unserious or satiric publications]. Therefore, I had the idea to ask the highest judges to transfer the case to the Jewish scholars […] However, since this is against the procedure of the Highest Imperial Court I submissively ask [for more time] […] since for this piecemeal work a year and a day will not be enough […]."[320]

Bamberger's confidential note to the agent found its way into the official RHR files and adds yet another dimension to the case. Incapable of responding to the Jewish law material himself, Bamberger hired two unnamed Jewish legal scholars to respond to the claims against him. Presumably they were not only supposed to counter the sources that Kann's legal team had presented, but to produce other legal material to support the Bambergers' claims.

But uncovering new Jewish legal sources was only part of the work. Any new material would have to be translated and explained, itself a daunting task. Bamberger and his lawyer did not have the cultural competence of a convert like Hartwig to translate and mediate between Jewish and non-Jewish legal systems. They would need help to formulate a solid counter-argument based on Jewish legal sources and make it comprehensible for Christian judges. Bamberger may have truly believed that the proper place for a discussion of Jewish

318 "RHR, Denegata Recentiora, K390-1," bundle 41, no folio. Regarding Schmidt, see Dölemeyer, *Frankfurter Juristen*, 176, no. 569.

319 The letter in the file was not signed by Bamberger. "RHR, Denegata Recentiora, K390-1," bundle 42, section O.

320 "RHR, Denegata Recentiora, K390-1," bundle 42, section O.

law was the rabbinic courts, but he knew that he could not ask the RHR to return the case to a rabbinic court. Resigned to the situation, Bamberger could only ask for more time.

Bamberger's note also confirms that, from the very beginning, Kann circumvented the rabbinic courts and brought the case directly before the Frankfurt magistrate as the court of first instance. The case before the Frankfurt magistrate, Bamberger pointed out, had been argued based on German law and in German. According to Bamberger, only when "Christian law" failed him in the first instance did Kann reverse his position and argue that Jewish law be applied by the RHR.

In April and June 1786, Bamberger sent letters to the RHR asking for an extension due to the illness of his attorney. These claims were substantiated by a letter from a Frankfurt physician. The RHR granted the first request but denied the second in early July 1786.[321]

By November 1786, the RHR had ordered that the files of the case be closed (*inrotulatio actorum*). As was common practice both at the RHR and the RKG, the court did not decide the case immediately.[322] Both the RHR and the RKG encouraged compromise rather than a court-imposed settlement.[323] Unable to respond to Kann's source book, Bamberger was forced to come to a compromise with Kann's representatives.

No information about the negotiations between the sides has survived but we know that it took almost six years for them to reach an agreement. On 3 September 1792, the parties informed the RHR that they had arrived at a settlement and the case could be dismissed. Presumably Bamberger and his wife agreed to pay to the Kann estate at least some of the money that Kann had claimed they owed him. The RHR moved quickly to close the case. On 11 September 1792, the RHR added a marginal note to the last page of the file saying that the appeal had been retracted and the file could be closed and sent to the official records (*ad acta*), and presumably from there into the archives, where it has rested for over two centuries.[324] (Figure 8)

321 "RHR, Denegata Recentiora, K390-1," bundles 43 (7 April 1786) and 46 (12 June 1786).

322 Kasper-Marienberg, *Vor Euer Kayserlichen Mayestät Justiz-Thron*, 126–127, with respect to the RHR. More than a third of cases involving Jews in the samples examined in Kasper-Marienberg's book were resolved through compromise. Regarding the RKG, Kaplan, *Cunegonde's Kidnapping*, 159, suggested that extending the duration of the proceedings was a way "of keeping the parties engaged with one another legally."

323 See Jahns, *Das Reichskammergericht und seine Richter*, 84 n. 109.

324 "RHR, Denegata Recentiora, K390-1," bundle 50, no pagination.

Figure 8: Manuscript bundle including annexes with gilt-edged pages. Austrian State Archive. ÖStA, HHStA, RHR Denegata recentiora, K390.

Conclusions

The Kann-Bamberger dispute demonstrates that Jews not only brought intra-Jewish litigation to non-Jewish courts, they also unabashedly brought their laws with them. While the lavish and extensive physical presentation of Jewish law to the RHR in this case was exceptional, the concept was not. The legal system of the Holy Roman Empire respected the integrity of Jewish law and Jews had the right to be judged by Christians according to that law. German jurists, particularly those who lived in areas where there were high concentrations of Jews, such as Frankfurt, had gained familiarity with Jewish law and customs through experience and legal treatises. In a case in which the litigants were all Jewish and the legal contract was based on Jewish law, the justice of the RHR who reviewed Kann's appeal was "absolutely sure" that the case should be judged by Jewish law. The litigants simply had to provide the judges with the applicable laws in a format that they could understand.

The process of translating Jewish law into German was both a linguistic challenge and a cultural one, and Kann's legal team tried to bridge both gaps. They hired a former yeshiva student who had converted to Christianity and was familiar with both Jewish and German law to mediate the material. This reveals a utilitarian, perhaps even tolerant, attitude towards Samuel Hirsch, the apostate. That Friedrich Christian Hartwig cooperated with members of the religious community that he had left, made efforts to shield them in his translation of legal materials, and later represented the entire Frankfurt Jewish community, shows that conversion was not always seen as a complete break from the community by either side. Perhaps if Hartwig had been a native Frankfurter, the interaction between the Jewish community and the convert would have been different, but that is mere speculation. The fact is that the community knew that Hartwig was a convert and worked with him, nevertheless.

The Kann-Bamberger dispute reflects no evidence of increased conversionary pressures on the Jewish community of late eighteenth-century Frankfurt, which still lived in a government-imposed ghetto whose gates were closed each night. Quite the contrary. The use of Jewish law in the Kann-Bamberger dispute shows that Jewish legal culture remained a vital point of reference for members of the Frankfurt Jewish community and the city's non-Jewish authorities. Even in the late eighteenth century, Jews in Frankfurt, as elsewhere in German-speaking lands, continued to use Hebrew-language contracts that were based on Jewish law. This explains the convert Franz Christoph Bacher's advertisement to translate business material from Hebrew into German, as discussed above. Moreover, in the eighteenth century, a body of German and Latin legal literature developed to help German jurists understand the workings of Jewish law. Jacob Georg Christian Adler (d. 1834), a Lutheran theologian and Orientalist, prepared an entire book of Jewish contracts that he translated into German.[325] In his foreword to the book, Oluf Gerhard Tychsen (d. 1815), a Lutheran who attended talmudic lectures in Altona in his early years and received a form of rabbinic ordination, noted that the translations would be highly useful in German courts.[326] This enterprise was worlds apart from that of, for example, the seventeenth-century Christians Hebraists who studied Maimonides's legal codes to better understand historical or philosophical truths.[327] This text, as well as the aforementioned translation of sections of *Shulḥan `aruk* and Levin's and Mendelssohn's legal works, were all geared to helping German jurists deal with Jewish legal culture in state courts.

Kann's need to substantiate his claims before the RHR brought at least one local legal professional into the Judengasse, where he interviewed members of the Jewish judiciary. The rabbinic judges cooperated with him, even in a case that they would have preferred to see judged in a Jewish court. The Imperial legal system and the rabbinic courts functioned separately and in very different spaces, but the legal professionals of the Jewish community cooperated

325 Adler, *Jüdischen Contracten*. The book was reprinted in Altona in 1792.

326 On Tychsen's rabbinic ordination, see Leiman, "Dr. Leiman's Post – Two Cases of Non-Jews with Rabbinic Ordination," and Reichman, "What Became of Tychsen?," accessed 17 October 2021.

327 On Christian Hebraists and their study of Maimonides's work, see Katchen, *Christian Hebraists and Dutch Rabbis*, 161–259.

with Kann's representative. Similarly, a Frankfurt notary came to the Bamberger residence in the Judengasse. At least during the day when the gates of the Jewish ghetto of Frankfurt were open, the space was permeable and the law sometimes demanded that non-Jewish officials enter its gates to deliver or collect information from Jewish residents there.

The Kann-Bamberger dispute also illuminates how the Frankfurt Jewish community had developed an extensive administrative apparatus around contracts. Like other Jewish communities, the Frankfurt Jewish community was well organized and had a written culture of documentation and archiving that included communal bylaws concerning commercial agreements, contractual records, notarial record books, scribal record books, and more. This was known to some jurists in the non-Jewish community. Friedrich Pufendorf specifically spoke of how the Jews kept records of agreements in a "Kinjan Buch" ("a purchase book"). Still, non-Jews were unlikely to have been familiar with all the intricacies of Jewish communal administrative life.[328]

Frankfurt Jews relied on the non-Jewish legal system, at least when they thought that it was in their best interests to do so. They hired non-Jewish legal professionals to prepare their cases and advance their interests in the state legal system. At times they may have been deceitful in presenting information to the court, such as when Kann's legal team brought documents that they falsely claimed were signed by Fradche and Lemele Bamberger as evidence – but these sorts of strategies may have been true of many litigants. The Frankfurt magistrate had experience in dealing with the local Jewish community and the RHR recognized this in the Kann-Bamberger case. Law faculties may have had copies of various Jewish legal works and may have developed legal theories about Jews and their laws. Together with the RKG, they gave greater authority to written law than custom. Yet neither the law faculties nor the RKG had the kind of familiarity with local commercial practices possessed by urban governments like the Frankfurt magistrate. In the case at hand, the law faculty at the University of Wittenberg was guided by Roman law rather than by the practice in Frankfurt with respect to a wife's liability for her husband's debts. Early modern courts, then, did much more than enforce existing law. Rather, judges, involved parties, and legal scholars engaged in an ongoing process of negotiating and adapting the law. While women were not represented on the benches, their cases, their arguments, and their aims shaped this law-producing process.

The adoption of Roman law in German towns in the late fifteenth and early sixteenth century was intended to make law more text-based and less dependent on local customs, which were sometimes hard to determine. Nonetheless, commercial practice continued to develop, sometimes in contradiction to written law. The Kann-Bamberger case is a reminder that laws on the books in both Jewish and general society did not necessarily fit contemporary realities and sometimes fell out of use. The *authentica* clause in loan agreements, as well as the financial liability of wives for their husband's loans in the Jewish community, are two examples of this phenomenon. Then as today, the marketplace moved more quickly than legislators.

328 Pufendorf, *Friderici Esaiae a Pufendorf*, 207. On communal record keeping, see Kaplan, *The Patrons and Their Poor*, 24–26.

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